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(27,157)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 402.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, THE MISSISSIPPI VALLEY COMPANY, D. A. SCOTT, AND E. M. YERGER, PLAINTIFFS IN ERROR,

vs.

THE CITY OF CLARKSDALE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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Caption.

No. 2006.

CITY OF CLARKSDALE

vs.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

ppealed from the Chancery Court, Second District, of Coahoma County, Mississippi, from a Decree Rendered on the 20th Day of April, 1918, by Hon. Joe A. May, Chancellor Seventh Chancery District of Mississippi.

Maynard & Fitzgerald, Sols. for Complainant.
Scott & Yerger, H. D. Minor, Counsel for Defendant.

STATE OF MISSISSIPPI,
County of Coahoma:

In the Chancery Court, Second Court District, April Term, A. D. 1917.

CITY OF CLARKSDALE, MISS., Complainant,

vs.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO., Defendant.

o the Hon. Joe A. May, Chancellor, etc.:

The complainant, the City of Clarksdale, a municipal corporation and a subdivision of the State of Mississippi, in Coahoma County, this its bill of complaint, against the Yazoo & Mississippi Valley ailroad Company, a railroad corporation organized under and doing business by virtue of the laws of the State of Mississippi, with a ne of railroad and office in the City of Clarksdale, in said County nd State, respectfully shows to the Court:

I.

That complainant is now and has been ever since April 29th 1891, ne legal and equitable owner of two hundred and fif*yt* (250) shares capital stock of the Louisville, New Orleans & Texas Railway Company, of the par value of One Hundred ($100.00) Dollars a share, evidenced by stock certificate No. 147 of the said Louisville, New rleans & Texas Railway Company, of date April 29th 1891, a true nd correct copy of which said stock certificate is herewith attached, arked exhibit "A" hereto and prayed to be made a part hereof;

that the said Louisville, New Orleans & Texas Railway Company, was at the date of April 29th, 1891, a railroad corporation organized under and doing business by virtue of the laws of the State of Mississippi, and that for the said shares of stock as evidenced by said certificate, of which exhibit "A" is a copy, complainant paid to the said L., N. O. & T. Railway Co., a full, adequate and valuable consideration.

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II.

Complainant alleges that thereafter, to wit: On October 25th, 1892, the said Louisville, New Orleans & Texas Railway Company, consolidated with the defendant, the Yazoo & Mississippi Valley Railroad Company, under and by virtue of the laws of the State of Mississippi, and the said two railroads, the Yazoo & Mississippi Valley Railroad Co., and the Louisville, New Orleans & Texas Railway Company, at the time of said consolidation entered into certain articles of consolidation, a copy of which is attached hereto, marked exhibit "B" and prayed to be made a part hereof.

III.

Complainant alleges that being at the date of said consolidation a bona fide stock holder in said Louisville, New Orleans & Texas Rail-Way Co., owning at said date the above described shares of stock, evidenced by stock certificate No. 147, of which exhibit "A" hereto is a copy, the complainant under and by virtue of the said articles of consolidation, of which exhibit "B" is a copy, and of the law in such cases made and provided, became and was at the date of said consolidation a stock holder in the said consolidated corporation, the defendant the Yazoo & Mississippi Valley Railroad Co., and owned and was possessed of an interest or share in the said consolidated corporation, the defendant the Yazoo & Mississippi Valley Railroad Co., in the proportion which the said two hundred and fifty shares of Louisville, New Orleans & Texas Railway Co., stock bore to the whole number of shares of stock which had theretofore been issued by both of said Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Co., up to the date of the consolidation of the two said railroad companies. And complainant alleges that the actual cash value of the said share or interest in the said consolidated company owned by the defendant as aforesaid, was at the date of said consolidation exceedingly valuable and worth in fact and in truth a sum exceeding $25,000.00; and com-

3 plainant alleges that now at this date the actual cash value of the share or interest of the complainant in the defendant consolidated company, the Yazoo & Mississippi Valley Railroad Co., is in excess of $75,000.00.

IV.

Complainant alleges that since the issuance of the said stock certificate No. 147, of which exhibit "A" is a copy as aforesaid, and

since the consolidation of the two said railroad companies, the Louisville, New Orleans & Texas Railway Co., and the Yazoo & Mississippim Valley Railroad Co., the complainant has never transferred, assigned, sold or disposed of in any way its said interest or share in the said Louisville, New Orleans & Texas Railway Co., or its interest or share in and to the said consolidated defendant company, the Yazoo & Mississippi Valley Railroad Co., nor has complainant transferred, assigned, sold or disposed of, or caused to be transferred, assigned, or sold or disposed of, its said certificate of stock, No. 147, in the said Louisville, New Orleans & Texas Railway Co. nor has complainant authorized or empowered any one else to so transfer, assign, sell or dispose of in any way its interest in either of said railroad companies, or its stock in the said Louisville, New Orleans & Texas Railway Co., as aforesaid, nor has the said interest or share or stock in either of said railroad companies belonging to complainant been transferred, assigned, sold or disposed of legally since the date of the issuance of said stock certificate No. 147 of said date of April 29th, 1891; but on the contrary, complainant alleges that it is now, and has been ever since the said date of April 29th, 1891, the true, legal and equitable owner of the said stock certificate No. 147 of the said Louisville, New Orleans & Texas Railway Co., of date of April 29th, 1891, of which certificate Exhibit "A" hereto is a copy, and complainant has been and is now, as aforesaid, the owner of said interest and share and stock in the defendant company the Yazoo & Mississippi Valley Railroad Co., ever since the consolidation, as aforesaid, of the said two rialroads.

4

V.

Complainant alleges that since its issuance to complainant, as aforesaid, on April 28th, 1891, of the said stock certificate No. 147 of the Louisville, New Orleans & Texas Railway Co., of which exhibit "A" hereto is a copy, the said stock certificate No. 147, evidencing the ownershop of complainant in and to said shares of stock and its interest and share in said Louisville, New Orleans & Texas Railway Co., and said consolidated defendant company, the Yazoo & Mississippi Vallay Railroad Co., has been misplaced, mislaid, lost, destroyed, stolen, or in some way arongfully and illegally taken and with-held from complainant, and although complai-ant has caused diligent search to be made by its officsrs and employees in all places where such papers or certificates should and ought to be found they have been unable to find said certificate, and now alleges that to the best of its knowledge and belief the said stock certificate has been misplaced, mislaid, lost, stolen, destroyed, or in some way wrongfully and illegally taken and with-held from complainant by parties unknown to complainant and without its consent.

VI.

Complainant further alleges that being unable to find the said certificate of Stcok No. 147, the evidence of ownership, as aforesaid, of the complainant of the stock, share or interest in the said con-

solidated company, the Yazoo & Mississippi Valley Railroad Co., the complainant has, time and again, applied to the defendant, the Yazoo & Mississippi Valley Railroad Company, consolidated as aforesaid, to issue to complainant a new certificate of stock either of the Louisville, New Orleans & Texas Railway Co., or the defendant Yazoo & Mississippi Valley Railroad Co., consolidated as aforesaid, or to give to defendant some evidence of the ownership of complainant of the share or interest of stock of the complainant in the said defendant Yazoo & Mississippi Valley Railroad Co., consolidated as aforesaid; but the said defendant company has as often failed, neglected and refused to issue said new certificate of stock or a statement of the ownership of complainant as aforesaid and the said defendant company has denied in toto any and all claims of the complainant to be a stock holder in or owner of any share or interest in either the said defendant Yazoo & Mississippi Valley Railroad Company, as consolidated, or the said Louisville, New Orleans & Texas Railway Company, and refuses to recognize complainant's rights in and ownership of any share or interest or stock in the said Louisville, New Orleans & Texas Railway Co., or the said Yazoo & Mississippi Valley Railroad Co., or either of them.

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VII.

Complainant alleges that since the consolidation of the said two railroad companies, the Louisville, New Orleans & Texas Railway Co., and the Yazoo & Mississippi Valley Railroad Co., as hereinbefore set forth, the said Louisville, New Orleans & Texas Railway Co., has merged its identity with the Yazoo & Mississippi Valley Railroad Co., and has now no offices either in or out of the State of Mississippi, in so far as complainant is informed and believes, and that complainant has no other person or corporation to apply to for an evidence of its ownership of the said stock, share or interest in and to either or both said railroad companies, the Louisville, New Orleans & Texas Railway Co., and the Yazoo & Mississippi Valley Railroad Company, consolidated as aforesaid.

VIII.

Complainant alleges that in order to secure the said defendant Yazoo & Mississippi Valley Railroad, consolidated as aforesaid, from harm or damage by any wrongful issuance of the said new certificate of stock or evidence of ownership of complainant of an interest or share in either or both of said railroad companies as demanded by complainant, that the said complainant is ready and willing to execute to the said defendant company a bond with good and sufficient surety in a reasonable sum, guaranteeing thereby to hold the said defendant, Yazoo & Mississippi Valley Railroad Co., harmless from any and all damages for the possible wrongful issuance of said stock certificate or evidence of ownership of interest or share of complainant as aforesaid.

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IX.

Complainant alleges that having been refused and denied any evidence of its interest or ownership of the stock, share or interest in and to either of said companies, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, as consolidated, that the said complainant has no plain, adequate and complete remedy at law to enforce its right share or interest in and to either or both of said railroad companies except by a bill in equity, and complainant is informed that it has the right to file a bill in equity in this Honorable Court and to procure a decree herein requiring the defendant's company to issue to complainant the proper, physical evidence of its stock, share or interest in and to the defendant consolidated Yazoo & Mississippi Valley Railroad Co., or in lieu thereof to have an accounting as between the complainant and the said defendant consolidated Yazoo & Mississippi Valley Railroad Co., to ascertain the extent and value, of complainant's stock, share or interest in said consolidated Yazoo & Mississippi Valley Railroad Company, and a decree in favor of complainant as against the defendant, the said Yazoo & Mississippi Valley Railroad Company, consolidated as aforesaid, for the value of its said stock, share or interest in said defendant company.

X.

Wherefore, in consideration of the premises, complainant prays that summons may be issued from this Honorable Court commanding the defendant Yazoo & Mississippi Valley Railroad Company to be and appear before this Honorable Court at its next regular term to be held in the City of Clarksdale, Miss., on the Second Monday in April, A. D. 1917, then and there to plead, answer or demur hereto, but not under oath, the oath or oaths to any answer or
7 answers filed herein being hereby expressly waived; and upon final hearing hereof complainant prays, in the alternat-e

(*a*) That a decree be entered herein ordering the defendant company to issue to complainant a certificate of stock or evidence of ownership of the defendant of its stock, share or interest in the consolidated Yazoo & Mississippi Valley Railroad Company, the defendant, in the amount or to the number as will equal the proportion which the 250 shares of Louisville, New Orleans & Texas Railway Company stock bore to the whole number or amount of shares of stock issued in the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company up to the date of said consolidation of the two said railroad companies, on October 24th, 1892; or in lieu thereof;

(*b*) That this Court appoint a Commissioner to take and state an account as between complainant and defendant, which account shall show the extent and value of complainant's stock, share or interest in and to the defendant, consolidated Yazoo & Mississippi Valley Railroad Company, at the date of the taking of said account, and

that when said value is so found a decree may be entered in favor of complainant against the defendant, the Yazoo & Mississippi Valley Railroad Company, consolidated, for the full cash value of complainant's stock, interest or share in the said defendant Yazoo & Mississippi Valley Railroad Co., consolidated; and for all costs expended hereon; and that said decree may recite that execution may issue thereon.

And if mistaken in the relief prayed for herein, than complainant prays for such other or further relief as the case may require or as to equity may seem meet. And complainant prays for general relief herein.

As in duty bound will ever pray, etc., etc.

MAYNARD & FITZGERALD,
Solicitors for Complainants.

8 STATE OF MISSISSIPPI,
County of Coahoma:

This day personally appeared before me, E. J. Mullen, a duly qualified and acting Notary Public in and for the County and State aforesaid, R. E. Stratton, Jr., the duly elected and qualified Clerk of the City of Clarksdale, complainant in the foregoing bill of complaint, who having been by me first duly sworn states on oath that the matters and facts alleged in the foregoing bill of complaint are true as therein stated, and that those matters which are alleged upon information and belief affiant beli-ves to be true.

R. E. STRATTON, JR.

Sworn to and subscribed before me, this the 29th day of February, A. D. 1917.

[SEAL.] E. J. MULLEN,
Notary Public.

My Commission expires on the 18th day of October, A. D. 1917.

9 EXHIBIT "A."

No. 147. 250 Shares.

Lousiville, New Orleans & Texas Railway Co.

Shares of $100.00 Each.

This is to certify that the City of Clarksdale, Miss., is entitled to Two Hundred and Fifty shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, transferrable in person or by attorney on the books of the said company, only on the surrender of this certificate for cancellation.

In witness whereof, the said company has caused this certificate to be signed by its Vice-President and Secretary this 29th day of April, 1891.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.,
By JAMES M. EDWARDS,
Vice-President.
[SEAL.] C. H. BOSHER, *Secretary.*

(Copy.)

10 *Articles of Consolidation.*

Louisville, New Orleans & Texas Railway Company

to

Yazoo & Mississippi Valley Railroad Company.

These Articles of consolidation, made this 24th day of October, A. D. 1892, by the Louisville, New Orleans and Texas Railway Company, a corporation of the State of Tennessee, Mississippi and Louisiana party of the first part, and The Yazoo & Mississippi Valley Railroad Company, a corporation of the State of Mississippi, party of the second part, Witnesseth: That under and by virtue of the charters of the respective parties hereto and of the laws of the respective States of Tennessee, Mississippi and Louisiana, in such cases made and provided, the said parties of the first and second part have mutually covenanted and agreed, and do hereby mutually agree and covenant to and with each other, to unite, merge and consolidate their several capital stocks, corporate rights, franchises, immunities and privileges of every kind, real and personal, and mixed, upon the following terms and conditions, that is to say:

Article #1.

Such consolidation shall be affected by uniting or merging the stock, property and franchises of the party of the first part with and into the stock, property and franchises of the said The Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last named Company, or the formation of any new, distinct Corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.

Article #2.

The corporate name of the said consolidated company shall be The Yazoo & Mississippi Valley Railroad Company.

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Article #3.

The capital stock of the said consolidated Company shall be Fifteen Million Dollars, to be divided into One Hundred and Fifty Thousand shares of One Hundred Dollars each; but the said corporation may at any time increase or diminish the amount of its Capital Stock according to law.

Article #4.

Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy; and shall have all the rights of a share holder of the consolidated company, as fully as if new shares of the Consolidated Company had been issued and exchanged therefor; and — case the Consolidated Company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent Companies; and the remainder of the Capital stock of the consolidated Company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the Board of Directors of said Company.

Article #5.

All and singular, the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, choses, in action and property and assets of every kind, nature or description, belonging to either of the parties hereto, shall be vested in and become the property of, the said Consolidated Company, without any further act, deed, or assurance being required in the premises.

Article #6.

The affairs of the consolidated company shall be managed by a Board of Directors which shall consist of such a number of members, not less than five, as the Company may determine — time to time, each of whom shall be a stockholder, and one of them
12 a resident of the State of Mississippi, one of Tennessee, and one of Louisiana. The members shall be divided into three equal classes as nearly as practicable. Successors, to serve for the term of three years, shall be chosen for those who belong to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected; for those who belong to the second class, at the next annual meeting; and for those belonging to the third class, at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in until his successor is elected. Vacancies in the Board, caused otherwise than by expiration of the terms for which the retiring director was

chosen may be filled by a vote of the majority of the directors remaining, such appointee to continue in office until the next regular election of directors by the stockholders.

The First Board of Directors shall be composed of the following members, divided in three classes as follows:

First Class, Stuyvesant Fish, Adolphe Schrieber, W. C. Craig, Charles A. Peabody, Jr.

Second Class, John W. Anchinclass, Walter Luttgen, Edward Harriman, J. T. Harahan.

Third Class, S. V. R. Cruger, R. P. Neeley, R. C. Shepard, Jno. C. Welling.

Article #7.

The Board of Directors of said consolidated Company shall choose one of their member president, whose term of office shall be one year, or until his successors shall be chosen and qualified. They may also appoint such other officers and agents as they may deem necessary from time to time, and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said Company as may be necessary or proper.

The said Board shall also have power to appoint an executive committee, of whom the President shall be one, Ex-officio, who shall possess and exercise all the powers and duties of the Board of
13 Directors when the board is not in session. Until otherwise ordered, the corporate seal of the said Consolidated Company shall be that of the Yazoo and Mississippi Valley Railroad Company.

Article #8.

The said Consolidated Company shall be, and the same is hereby authorized and empowered, in such manner and upon such conditions as are permitted by law, to issue its Bonds and to secure the same, as well as all bonds heretofore issued by either of the constituent companies, or that have been or may be hereafter issued by any other Railroad Company, by mortgage or deed of trust upon any or all of its railroad rights, franchises and property, real or personal, wherever the same may be situated, and whether the same may be owned by said Company at the time this consolidation is effected or may be thereafter acquired; and may also exercise any and every other corporate right or power now vested in, or which might have been heretofore legally exercised by either of said constituent Companies.

Article #9.

The provisions of these articles shall be obligatory upon the successors and assigns of the respective parties hereto and shall become operative and of force from and after the twenty fifth day of October A. D. 1892.

In witness whereof, the parties hereto have caused their Corporate names to be subscribed by their respective President, and their Corporate seals to be affixed by their respective Secretaries on the day and year first written.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.,
By RICHARD T. WILSON, *President.*

Attest:
[SEAL.] CHARLES H. BOSHER, *Secretary.*

THE YAZOO & MISSISSIPPI VALLEY RAILROAD,
14 By STUYVESANT FISH, *President.*

Attest:
[SEAL.] ALEXANDER G. HACKSTAFF, *Secretary.*

Witness:
As to the Louisville, New Orleans & Texas Railroad Co.
S. TOWNSEND.
J. F. VAN HOME.
GEO. H. TAYLOR.
As to the Yazoo & Mississippi Valley Railroad.
W. E. RUTTEN,
CHARLES H. WENMAN, AND
GEORGE H. TAYLOR.

STATE OF NEW YORK,
County and City of New York:

Be it remembered that on this the 24th day of October, A. D. 1892, before me George H. Taylor, a duly appointed Notary Public in and for the city and County of New York, State of New York, and commissioner for the State of Tennessee in and for the State of New York, residing in said city and County of New York, personally appeared Richard T. Wilson, President of the Louisville, New Orleans and Texas Railroad Co., and Charles H. Bosher, Secretary of the same Company, to me personally known and known to me as such officers, of said Company, who, being by me severally sworn, did depose and say: That the said Richard T. Wilson was President and the said Charles H. Bosher was the secretary of the said Company; That they knew the Corporate seal of said Company; That the seal affixed to the foregoing instrument was such Corporate seal. And that it was so affixed thereto by the order of the Board of Directors of the said Company; and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by like order, as President and Secretary of said Company, respectively.

15 In witness whereof, I have hereunto set my hand and affixed my official seal this twenty fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Tennessee in New York and
Notary Public, N. Y. County.

STATE OF NEW YORK,
County and City of New York:

Be it remembered that on this twenty *foi*rth day of October, A. *A.* 1892, before me George H. Taylor, a duly appointed Notary public in and for the county and City of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and County of New York, personally appeared Richard T. Wilson, President of the Louisville, New Orleans and Texas Railroad Company, and Charles H. Bosher, Secretary of the same Company, to me personally known to be such officers of said Company, who being severally sworn, did depose and say that the said Richard T. Wilson was the President, and the said Charles F. Bosher was the secretary of the said Company; that they knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the Board of Directors of said Company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names, thereto by a like order as President and Secretary of said Company, respectively.

In witness *hw*-reof, I have hereunto set my hand and affixed my official seals, this 24th day of October, 1892.

[SEAL.] GEORGE H. TAYLOR,
[SEAL.] *Commissioner for Mississippi in New York and*
Notary Public, N. Y. County.

STATE OF NEW YORK,
City and County of New York:

16 Be it remembered that on the 24th day of October, A. D. 1892, before me George H. Taylor a duly appointed Notary Public in and for the City and County of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in the City and County of New York Personally appeared Stuyvasant Fish, President of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company who being by me severally sworn, did depose and say: That he the said Stuyvesant Fish was the president and that he the said Alexander G. Hackstaff, was the secretary of the said company that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors, of said company; and that they the said Stuy-

vesant Fish and Alexander G. Hackstaff, signed their names thereto by like order as president and secretary of said company respectively.

In witness whereof I have hereunto set my hand and affixed my official seals this 24th day of October, 1892.

[SEAL.] GEORGE H. TAYLOR,
[SEAL.] *Commissioner for Tennessee and Notary Public, N. Y. County.*

STATE OF NEW YORK,
City and County of New York:—

Be it remembered that, on the 24th day of October, 1892, before me George H. Taylor, a Notary Public duly appointed in and for the City and County of New York, State of New York, and Commissioner of the State of Mississippi, in and for the State of New York, residing in said City and County of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, Secretary of the said Company, to me personally known and known to me to be such officers, of said company who, being by me severally
17 duly sworn did depose and say; That he the said Stuyvesant Fish, was the president and that he, the *d*aid Alexander G. Hackstaff, was the secretary of the said Company, that they knew the Corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the Board of Directors of said Company; and that they Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and Secretary respectively.

In witness whereof, I have hereunto set my hand and official seal this 24th day of October A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
[SEAL.] *Commissioner for Mississipi in New York and Notary Public, N. Y. County.*

STATE OF NEW YORK,
City and County of New York:

Be it remembered that on the 24th day of October A. D. 1892, before me George H. Taylor a duly appointed Notary Public, in and for the City and County of New York, State of New York and Commissioner for the State of Louisiana in and for the State of New York, residing in said City and County of New York, personally appeared Stuyvesant Fish, President of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, Secretary of the same Company, to me personally known and known to me to be such officers of said company, who being by me severally

duly sworn, did depose and say: That he the said Stuyvesant Fish, was the President and that he the said Alexander G. Hackstaff was he Secretary of the said company, that they knew the corporate eal of said company; that the seal affixed to the foregoing instru- ient was such corporate seal and that it was so affixed thereto by the rder of the board of directors of said company, and that they the said Stuyvesant Fish and Alexander G. Hackstaff signed 8 their names thereto by the like order president and secretary of said Company respectively.

In witness whereof, I have hereto set my hand and affixed my fficial seals this 24th day of October, 1892, A. D.

GEORGE H. TAYLOR,
Commissioner for Louisiana in New York and Notary Public, N. Y. County.

Office of Secretary of State.

Jackson, Mississippi,

Nov. 4th, 1898.

I, J. L. Power, Secretary of State, do certify that the foregoing nd annexed articles of consolidation of the Louisville, New Orleans nd Texas Railroad Company and the Yazoo and Mississippi Valley ailroad Company are true and correct copies of the original filed n this office on the 27th day of October, 1892.

Given under my hand and the great seal of the State of Missis- ppi, this 4th day of November A. D. 1898.

[SEAL.]

J. S. POWER,
Secretary of State.

Filed for record Nov. 19th, 1898.
Recorded Nov. 28th, 1898.

M. J. BOULDIN, *Clerk.*
J. R. ALCORN, *D. C.*

TATE OF MISSISSIPPI,
Coahoma County, Friar Point:

I, S. F. Carr, Chancery Clerk for and in said County and State, o hereby certify that the foregoing copy of the Consolidation of ouisville, New Orleans and Texas Railroad; and the Yazoo and ississippi Valley Railroad Companies as recorded in Book J, 2, on age 501, is a true and correct copy of the Articles of Consolidation recorded in the records of the office of the Chancery Clerk at riar Point, Miss.

Witness therefore my hand and official seal this 20th day of Jan- uary, A. D. 1917.

[SEAL.]

S. F. CARR, *Clerk,*
By B. HOLLINGSWORTH, *D. C.*

Endorsed on the back of the foregoing instrument is the filing thereof, which said filing is in words and figures following towit:

"Filed and Process Issued This February 29th, 1917.
S. F. CARR, *Clerk*,
By S. L. DODSON, *D. C.*"

20 *Summons.*

STATE OF MISSISSIPPI,
Coahoma County, ss:

Chancery Court.

To the sheriff of Coahoma County, Greeting:

You are hereby commanded to Summon Y. & M. V. R. R. Company if to be found in your county, to be and personally appear before the Chancery Court, Coahoma County, at the Court House of said County, in the Town of Clarksdale, on the Second Monday in April, 1917, then and there to Plead, Answer or demur to the bill this day filed by the City of Clarksdale, wherein you are defendant. Herein fail not, and have you then and there this writ.

Issued under my hand and seal of said Court, at office in Clarksdale, the 28th day of February, 1917.

[SEAL.]

S. F. CARR, *Clerk*.
By S. L. DODSON, *D. C.*

Sheriff's Return.

Sec. 3428.

THE STATE OF MISSISSIPPI,
County of Coahoma:

Executed the within writ this 1st day of March, 1917, by delivering to J. W. McNair, Agent for the Yazoo-Mississippi Valley Railroad Company at Clarksdale, a true copy of this writ.

J. C. BAUGH, *Sheriff*.
By H. L. TALBERT, *D. S.*

Ex.	1.50
E. & R.	.50
	2.00

Endorsed on the back of the foregoing instrument is the filing thereof, which said filing is in words and figures following towit:

"Filed this 7th day of March, 1917.
S. F. CARR, *Clerk*,
By S. L. DODSON, *D. C.*"

21 CITY OF CLARKSDALE

VS.

Y. & M. V. RY. CO.

By consent of Complainant, the Defendant is hereby granted leave to file its answer herein at any time within sixty days from this date as of this term of Court. Ordered and judged and decreed this 10th day of April, 1917.

JOE MAY, *Chancellor.*

O. K.
G. F.

M. D. 104.

"This decree is of record in the Minutes of the Chancery Court Book 5, page 4."

22 STATE OF MISSISSIPPI,
County of Coahoma:

In the Chancery Court, Second Court District.

CITY OF CLARKSDALE, MISS., Complainant,

VS.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendant.

Answer of the Yazoo & Mississippi Valley Railroad Company to the Bill of Complaint Filed against It in the Above-entitled Case.

Respondent, The Yazoo & Mississippi Valley Railroad Company, for answer to the bill filed against it in the above entitled cause, admits that complainant is a municipal corporation, organized and existing under the laws of the State of Mississippi, but denies that complainant is a subdivision of said State. Respondent admits that respondent is a railroad corporation organized and existing under the laws of the State of Mississippi, with lines of railroads and offices in Clarksdale, Mississippi, and in Coahoma County, Mississippi.

I.

Respondent denies the allegations contained in the first paragraph of complainant's bill and particularly denies that complainant is now and has ever been since April 29th, 1891, the legal and equitable owner of 250 shares of the capital stock of the Louisville, New Orleans & Texas Railroad Company, as evidenced by stock certificate No. 147 of the Louisville, New Orleans and Texas Railway Company, of date April 29, 1891, and as set out in complainant's bill.

Respondent admits that on April 29, 1891, the Louisville, New Orleans & Texas Railway Company, was a railroad corporation organized under and doing business by virtue of the laws of the State of Mississippi and that on said date the Louisville, New Orleans & Texas Railway Company, delivered to the City of Clarksdale, or to parties acting for it, its certificate of stock No. 147 as referred to in complainant's bill, and that a short time thereafter the complain-

23 ant paid the Louisville, New Orleans & Texas Railway Company, or caused to be paid to the Louisville, New Orleans & Texas Railway Company, the consideration for said stock which had previously been agreed upon by complainant and said Louisville, New Orleans & Texas Railway Company, but respondent says that the City of Clarksdale lost all right, title and interest to said certificate and said stock on December 6, 1897 by reason of a judicial sale and transfer of said stock on said date and for other reasons as will be more fully stated hereinafter.

24 II.

Respondent admits that on October 25, 1892 the Louisville, New Orleans & Texas Railway Company and the Yazoo and Mississippi Valley Railroad Company were consolidated, and assumes that the copy of the Articles of Consolidation are correctly set out in Exhibit B of complainant's bill, but if it be material, complainant will produce on the hearing the original Articles of Concolidation.

25 —.

Respondent admits that at the date of the consolidation just referred to the complainant was a bona fide stockholder in the Louisville, New Orleans & Texas Railway Company and owned at said date 250 shares of stock in said company, as respondent by stock certificate No. 147, referred to in complainant's bill, and that complainant by virtue of said consolidation became a stockholder in the consolidated corporation, the defendant, the Yazoo and Mississippi Valley Railroad Company, and that complainant owned and was possessed of an interest or share as a stockholder in said consolidated company in the proportion in which the 250 shares of stock owned by complainant in the Louisville, New Orleans & Texas Railway Company bore to the whole number of shares which had theretofore been issued by the Louisville, New Orleans & Texas Railway Company and the Yazoo and Mississippi Valley Railway Company up to the date of said consolidation, but respondent avers that said interest or share was only such interest or share as a stockholder as under the law in the State of Mississippi.

Respondent denies that the actual cash value of the stock or interest of complainant in said consolidated company was at the date of said consolidation, exceedingly valuable, and that it was worth exceeding $25,000.00, and respondent denies that at the present time the complainant has stock or interest in or is entitled to any stock or interest in respondent company and denies that 250 shares of

stock in respondant company is at the present time of a cash value in excess of $75,000.00.

On the other hand, respondant avers that the complainant in the litigation, which will hereafter be referred to repeatedly, averred that said stock of complainant in the Louisville, New Orleans & Texas Railway Company was worthless, and respondant avers that no dividend has been earned on either the stock of the Louisville, New Orleans & Texas Railway Company or the stock of the Yazoo Mississippi Valley Railroad Company as originally chartered or
26 as consolidated, and that stock in the Yazoo & Mississippi Railroad Company has little intrinsic value.

27 IV.

Respondent denies the allegations contained in the fourth paragraph of complainant's bill, and respondent will later in this answer fully set out the history of the *the* stock certificate No. 147, in the Louisville, New Orleans & Texas Railway Company, being the same stock certificate mentioned in complainant's bill.

28 V.

Respondent denies the allegations contained in the fifth paragraph of complainant's bill and denies particularly any ownership of complainant in stock certificate No. 147 referred to in complainant's bill and denies particularly any interest or right on the part of complainant in said stock certificate and denies that said stock certificate has been misplaced, mislaid, lost, destroyed or stolen, or wrongfully or illegally taken or withheld from complainant. Respondent alleges that said stock certificate is in existence and will be produced on the hearing, and respondent avers that all right, title and interest in the 250 shares of stock in the Louisville, New Orleans & Texas Railway Company, as evidenced by said stock certificate No. 147, was sold on December 6, 1897 by virtue of a judgment against complainant in a suit in the United States Circuit Court for the Northern District of Mississippi entitled Pacific Improvement Company vs. City or Town of Clarksdale, and that by virtue of said sale, said certificate of stock was transferred and delivered to the purchaser at said sale, and that said purchaser thereby became the legal owner of said stock and said certificate, as will be more fully set out hereafter.

29 VI.

Respondent admits the allegations contained in the sixth paragraph of complainant's bill and again avers that complainant is not a share holder of defendant and is not entitled to have any value of any stock of defendant paid to it and has no rights whatever as a stockholder of defendant or of the Louisville, New Orleans & Texas Railway Company, and respondent avers that it has repeatedly advised complainant that all rights -f complainant as a stock holder in

the Louisville, New Orleans & Texas Railway Company or of the Yazoo & Mississippi Valley Railroad Company have been lost by virtue of the sale of said stock certificate No. 147 by order of the United States Circuit Court for the Northern District of Mississippi and for other reasons. Complainant was a party defendant to the suit in the United States Circuit Court for the Northern District of Mississippi in which said stock was sold and actively participated in said litigation and knows of the sale of said stock in said litigation. Respondent cannot understand the allegation in complainant's bill that complainant was unable to find said stock and that the same has been lost or mislaid, when complainant knows that said stock was sold in said judicial proceeding just referred to.

30 VII.

Respondent, in response to the seventh paragraph of complainant's bill, says that the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company were consolidated by virtue of the Articles of Consolidation referred to in complainant's bill, and respondent says that since said consolidation said Louisville, New Orleans & Texas Railway Company has ceased to exist as a separate corporation, but that its identity and corporate franchises have been merged into the Yazoo & Mississippi Valley Railroad Company by virtue of said consolidation, and that Louisville, New Orleans & Texas Railway Company as such maintains no offices in Mississippi or elsewhere, and that said Louisville, New Orleans & Texas Railway Company as such no longer exists.

31 VIII.

In response to the eighth paragraph of complainant's bill respondent denies that complainant is entitled to have issued to it a certificate of 250 shares of stock in the respondent company and respondent avers that as complainant has no right to have said stock issued to complainant, respondent cannot be required to issue to complainant said stock even though complainant should give respondent an indemnity bond to protect respondent against any damage which respondent might sustain by reason of the issue of said stock.

32 IX.

Respondent denies that complainant has no plain, adequate and complete remedy at law to enforce the rights which it claims in this case and denies that complainant has the right to procure by judicial process a decree requiring defendant to issue to complainant stock or the evidence of stock in defendant and denies that complainant is entitled to an accounting between complainant and defendant to ascertain the extent and value of the stock or interest which complainant claims in defendant and denies that complainant is entitled to a decree against the defendant for the value of the stock or

interest in defendant which is claimed by complainant, and denies that complainant is entitled to any of the relief sought by complainant.

33 X.

And now having answered the allegations of complainant's bill, respondent avers that during the fall of the year 1889 the Louisville, New Orleans & Texas Railway Company owned and operated a line of railroad extending from Memphis, Tennessee, through Clarksdale, Mississippi, to New Orleans, Louisiana, and that said line of railroad is the present main line of respondent; that the City of Clarksdale and the citizens thereof were desirous that a branch line of railroad should be constructed, running in an eastern or southeastern direction from Clarksdale down the Tallahatchie River and its confluents, to be known as the Tallahatchie Branch of the Louisville, New Orleans & Texas Railway Company, and that negotiations took place between the officers of the Louisville, New Orleans & Texas Railway Company, and the City of Clarksdale, and with the citizens thereof, the result of which was that on October 19, 1889, James M. Edwards, the then Vice-President of the Louisville, New Orleans & Texas Railway Company addressed a letter to the Mayor and Aldermen of the Town of Clarksdale, in which it was stated that it had been represented to him that in consideration of the location and construction of the said Tallahatchie Branch from the main line at Clarksdale, or within one half mile of the then depot at Clarksdale, the Town of Clarksdale would subscribe $25,000.00 to the stock of said Branch Road and would guarantee the railroad company the right of way from Clarksdale, or from the junction point near Clarksdale, to the boundary line of Coahoma County, said stock to be paid for with $25,000.00 (par value) of bonds of the City of Clarksdale, rearing interest at the rate of six per cent per annum, and the said Edwards requested that *rpoer* steps be taken for submitting to the vote of the citizens of Clarksdale the question of said subscription. Thereupon the Mayor and Board of Aldermen of the T*w*on of Clarksdale una*m*imously passed an ordinance fixing November 25,
34 1889, as the date for the vote to be taken on said subscription and on said — an election was held, and the result was that all the votes cast favored the subscription and no vote was cast against the subscription. Thereafter on November 26, 1889, the Board of Mayor and Alderman of the City of Clarksdale after canvassing the returns of said election ordered the then Mayor of Clarksdale to subscribe in the name of the City of Clarksdale for $25,000.00 of the stock of said railroad company and said Board further ordered that the bonds of the City of Clarksdale should be lithographed and executed by the Mayor of the City of Clarksdale and that after said bonds had been prepared and executed, said Board directed that the same should be delivered to the Clarksdale Bank and Trust Company, of Clarksdale, as Trustee, and that said Trustee was to deliver said bonds to said railroad company when said Tallahatchie Branch

was constructed and opened for business to the southeast or eastern line of Coahoma County.

Thereupon said railroad company proceeded to construct said Tallahatchie Branch and did construct same and opened same for business and began operating same, and said branch has since said time been in continuous operation.

In conformity with the action of the citizens of Clarksdale as expressed in said election and in conformity with the action regularly taken by the Board of Mayor *of* Aldermen of the City or Town of Clarksdale twenty five bonds of the City of Clarksdale each of the par value of $1,000.00, dated Jan. 15, 1891, and maturing twenty years after date, and bearing interest at the rate of 6% per annum, payable on Jan. 15 of each year, were deposited with the Clarksdale Bank and Trust Co. as Trustee for the City of Clarksdale, to be exchanged for 250 shares of stock in the Louisville, New Orleans & Texas Railway Company, each share of said stock being of the par value of $100.00. That on April 29th, 1891, the Louisville, New Orleans & Texas Railway Company delivered to the said Trustee, its certificate No. 147 for 250 shares of stock (each share being
35 of the par value of $100.00) and on May 13, 1891, said Clarksdale Bank & Trust Company, as Trustee for the City of Clarksdale, delivered to said railroad company the 25 bonds of the City of Clarksdale above mentioned, and the exchange of the stock and bonds was thus completed as contemplated.

Respondent further shows that after said time the said bonds were disposed of by said railroad company in due course of business, and the Pacific Improvement Company, a corporation of the State of California, and R. T. Wilson, a citizen of New York, became the owners of said bonds.

The City of Clarksdale failed to pay the interest on said bonds and on August 4, 1894 the Pacific Improvement Company, filed a suit against the City of Clarksdale in the United States Circuit Court for the Northern District of Mississippi, said suit being to recover the unpaid coupons on the bonds owned by the Pacific Improvement Company. That said suit was entitled "Pacific Improvement Company vs. City (or Town) of Clarksdale. Said suit was contested by the City of Clarksdale, various defences being presented, and upon the trial of the said cause there was a verdict and judgment in favor of the City of Clarksdale on the 11th day of June, 1895. That said cause was thereupon taken by appeal or writ of error to the United States Circuit Court of Appeals for the Fifth Circuit and by said Court the judgment of the United States Circuit Court for the Northern District of Mississippi was reversed and said cause remanded for a new trial. That the opinion of the Court in reversing said cause is set out in the case entitled "Pacific Improvement Company vs. City or Town of Clarksdale, 74 Federal Reporter, page 528. That upon a reversal and remand of said cause the same was again tried and on June 2, 1896, there was a verdict and judgment in favor of the Pacific Improvement Company against the Town of Clarksdale for $3,058.13. Thereupon said cause was taken to the United States

Circuit Court of Appeals for the Fifth Circuit by appeal or
36 writ of error and in said Court said judgment in favor of the Pacific Improvement Company and against the City of Clarksdale was affirmed. The opinion of the Circuit Court of Appeals in affirming said judgment is reported in 81 Federal Reporter, page 329.

Said judgment was not paid by the City of Clarksdale, and by virtue of a writ of execution issued in said cause, the said certificate of stock, which was still in the hands of the Clarksdale Bank & Trust Company as trustee, for the City of Clarksdale, was levied on by the United States Marshal, and was by the United States Marshal sold on Dec. 6, 1897 to the Pacific Improvement Company for the sum of $100.00, and thereby the said Pacific Improvement Company became the owner of 250 shares of stock in the Louisville, New Orleans & Texas Railway Company which had originally belonged and been the property of the City of Clarksdale.

The said credit of $100.00 upon the judgment in favor of the Pacific Improvement Company left a greater portion of aforesaid judgment unpaid and thereupon steps were taken by the City of Clarksdale to escape the payment of said judgment and the obligations of the bonds of said City. The officers of said City resigned so as to leave no one upon whom process would be served and an effort was made in the Legislature of the State of Mississippi of 1898 to pass an act to provide for the government of municipal communities which were without municipal officers. Said bill failed of passage, but the municipality of Clarksdale continued without municipal officers from about January 1 to July 11, 1898.

R. T. Wilson also brought suit in the United States Circuit Court, for the Northern District of Mississippi to recover judgment on the coupons of bonds owned by him, but said suit was never brought to trial.

During said period when the municipality was without officers and with no one to represent said municipality, several prominent citizens of the municipality, acting on their own responsibility, and in their individual capacity, took steps to reach some adjust-
37 ment with the Pacific Improvement Company and R. T. Wilson, the owners of the bonds of said municipality. The result of these efforts on the part of said individual citizens was that a committee, consisting of W. P. Holland, Hon. J. W. Cutrer, and E. L. Anderson, went to New York City in June, 1898, to confer with the owners of said bonds. Said committee was acting in its individual capacity, or as representing interested individual citizens and was not representing the municipality of Clarksdale, for said municipality at said time had no municipal officers to act or take any steps for it. The said conference in New York was held and as a result thereof the said committee paid to the owners of said bonds, The Pacific Improvement Company and R. T. Wilson, the sum of $25,000.00 in cash and the owners of the bonds set over and assigned to the Planters' Bank of Clarksdale (which had advanced said $25,000.00), the said $25,000.00 of bonds issued by the City of Clarksdale, together with all matured and unmatured coupons.

The terms of said settlement were set forth in an agreement in writing, which is as follows:

"In consideration of the payment to us the Pacific Improvement Company and R. T. Wilson & Company, by the Planters Bank of Clarksdale, Miss., of the sum of Twenty Five Thousand Dollars, ($25,000.00), cash in hand on this day, we, the said Pacific Improvement Company and R. T. Wilson & Company hereby transfer set over and assign to the said Planters Bank the full issue of twenty five thousand dollars, ($25,000.00) of bonds issued by the City of Clarksdale to the Louisville, New Orleans & Texas Railway Company and payable to the said company as bearer, said bonds being six per cent bonds, together with all unpaid, past due coupons, originally attached to said bonds and all maturing coupons, attached thereto. This transfer included the transfer and assignment of a certain judgment rendered in favor of the Pacific Improvement Company on certain of past due coupons against the City of Clarksdale, rendered by the circuit court for the Western Division of the Northern District of the United States at Oxford, Mississippi, and also all pending suits upon any of said past due coupons, in favor of either
38 of us.

All costs which have been paid by us up to date we assume, all other costs to be assumed by the Planters Bank except the costs in the suit of R. T. Wilson & Company vs. the City of Clarksdale, now pending which is to be dismissed at once at plaintiff's costs. In testimony whereof we have hereunto set our hands in triplicate on this the 30th day of June, 1898.

PACIFIC IMPROVEMENT CO.,
By I. C. GATES, *Asst. Secy.*
R. T. WILSON & COMPANY,
By J. M. EDWARDS, *Attorney.*

39 Respondent further states that in said transaction the owners of said bonds lost about $10,000.00 of interest by reason of the delivery to said Planters Bank of said bonds, together with the coupons. The said Certificate of stock is not mentioned in said agreement and was not returned by the said Pacific Improvement Company to said committee or to the Planters Bank, nor was it contemplated by any of the parties that it should be returned. At the time of said settlement in New York said certificate was in the possession of the Pacific Improvement Company in its office in New York and after said settlement said Pacific Improvement Company continued to hold said certificate and it continued to remain the property of the said Pacific Improvement Company until October 4, 1904, when said certificate was sold by said Pacific Improvement Company in due course of business to The Mississippi Valley Company. Thereupon said Mississippi Valley Company delivered said certificate to the Yazoo & Mississippi Valley Railroad Company and received in lieu thereof a certificate for 250 shares in the Yazoo & Mississippi Valley Railroad Company, said certificate reading in the name of the Mississippi Valley Company and said certificate is still in the pos-

session of the Mississippi Valley Company, which is still the legal owner and holder thereof.

After this settlement by said Committee in New York, the City Government of Clarksdale was reorganized on July 11, 1898. Respondent attaches hereto and makes a part hereof as Exhibit "A" duly certified copies of the minutes of two meetings of the Board of Mayor and Aldermen of the Town of Clarksdale of July 11, 1898; also the minutes of a meeting of the Board of Aldermen and Mayor of said municipality of January 14, 1899. Said minutes show on their face the settlement which was made as to said bonds between the reorganized Town of Clarksdale and the Planters Bank of Clarksdale.

Respondent now says that it is apparent, and so alleges the fact to be, that the City or Town of Clarksdale has no interest in the
40 Louisville, New Orleans & Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company and is not entitled to have any stock in the Louisville, New Orleans & Texas Railway Company or The Yazoo & Mississippi Valley Railroad Company issued to it and is furthermore not entitled to any accounting or to the value of any stock.

Respondent further says that the Louisville, New Orleans & Texas Railway stock originally issued to the City of Clarksdale was sold under judicial sale and purchased by the Pacific Improvement Company and that if the City of Clarksdale, the com-lainant in this case, has any claim to said stock (which respondent denies) said claim necessarily arises through assignment of the Planters Bank to the City of Clarksdale, and that the Planters Bank is barred by the statute of limitation as to any claim relative to said stock and that likewise the City of Clarksdale as the assigns of the Planters Bank is barred, and that said claim, if any ever existed, has been in existence since June 30, 1898, and respondent therefore pleads and relies upon the statute of limitations of three years, six years, and ten years, of the State of Mississippi.

Respondent further says that complainant, if any rights it ever had, has been guilty of such laches that it is not entitled to any relief in a Court of Equity, and respondent pleads the laches of complainant in asserting the rights claimed by complainant as a defense to this suit and a bar thereof.

Respondent further says that complainant in asserting its claim for stock in the Louisville, New Orleans & Texas Railway Company, or claim to an accounting, or to the value of the stock formerly owned by it in the Louisville, New Orleans & Texas Railway Company, was and is acting in a private and not a governmental capacity, and is barred by the statute of limitations as above set out, and has also been guilty of such laches as to repel complainant in
41 equity, and is also estopped by its acquiescence for nearly nineteen years in the ownership of said stock by the Pacific Improvement Company and its vendee, the Mississippi Valley Company, to now set up a rightful claim (even if it had any, which respondent denies), to said stock, or to a certificate representing same, or to an accounting, or for the value of said stock. After all of said

period of nineteen years, when complainant has known that said stock was in the possession of the Pacific Improvement Company, by virtue of said judicial sale, and that said Pacific Improvement Company claimed the ownership in and title to said stock, and after sale of said stock by the Pacific Improvement Company and after the claim of complainant to said stock or to be a stockholder in respondent has been repeatedly denied by respondent, it is now too late for complainant to assert any right to said stock.

XI.

And respondent now having fully answered complainant's bill and being advised that on the facts by respondent herein before alleged in its answer, it is entitled to relief, respondent assumes the character of a cross-complainant and prays:

First, that this answer be filed, treated and deemed as a cross-bill, and that a subpœna and copy of this cross bill be served upon complainant in the original bill to compel complainant to answer this bill, but not under oath, the answer under oath being specially waived.

Second, that this Court judicially determine and decree that complainant is not a stock holder in the Yazoo & Mississippi Valley Railroad Company and is not entitled to have any stock in The Yazoo & Mississippi Valley Railroad Company issued to it and is not entitled to have an accounting, and is not entitled to have the value of 250 shares of stock in the Yazoo & Mississippi Valley Railroad Company paid to complainant and adjudging to be without merit the claim of complainant to 250 shares of stock in The Yazoo &
42 Mississippi Valley Railroad Company by reason of the former ownership of the complainant of 250 shares of stock in the Louisville, New Orleans & Texas Railway Company, as evidenced by stock certificate No. 147 above referred to, and enjoining the complainant and any other party acting under or through complainant from asserting any claim to stock in the Yazoo & Mississippi Railroad Company by reason or growing out of the former ownership of complainant of said stock certificate No. 147, for 250 shares of stock in the Louisville, New Orleans & Texas Railway Company as above set out.

Third, that Respondent may have such further other and general or special relief as in equity it may be entitled.

This is the first application made by the respondent in this cause for an injunction.

SCOTT & YERGER.
CHARLES W. BURCH,
H. D. MINOR,
Solicitors for Respondent.

STATE OF ILLINOIS,
County of Cook:

C. H. Markham makes oath that he is the President of the Yazoo & Mississippi Railroad Company, and that he is personally ac-

quainted with the matters stated in the foregoing cross-bill, and that the allegations therein made as statements of fact are true and that the allegations therein made upon information and belief he verily believes to be true.

C. H. MARKHAM.

Sworn to and subscribed before me, this 7th day of June, 1917.
[SEAL.] M. J. O'CONNELL,
Notary Public.

My commission expires January 11, 1920.

13 *Reorganization of the Town of Clarksdale, Mississippi.*

Be it remembered that, the Board of Mayor and Aldermen of the Town of Clarksdale, Mississippi, met at the office of the Mayor on July the 11th, 1898, for the purpose of reorganizing, with the following officers, who had been appointed by the Governor of the State:

Walter Clark, Mayor; J. R. Bacot, J. A. Dolan, Guy F. Clark, W. D. Cutrer, Al Nachman, Aldermen; W. H. McCroy, Marshal; and T. B. Ward, Treasurer.

Chancery Clerk, M. J. Bouldin, administered the oath of office to the newly appointed officers, and then the Board proceeded to business by electing J. J. Price Clerk of the Board, and the following officers were elected: W. D. Cutrer, Mayor, Pro-Tem, J. W. Cutrer, City Attorney, Dr. H. C. Buck, City Health Officer.

The Bond of Mayor Clerk for two thousand dollars with Walter Clark, C. W. Clark and J. W. Cutrer, as sureties was accepted, and also the bonds of W. H. McCroy for four thousand dollars, two thousand dollars as City Marshal, and two thousand dollars as City Tax Collector, with W. H. McCroy, C. W. McCroy, J. W. Cutrer, H. H. Copson, J. L. Shannon, and O. M. Mills, as sureties was also accepted.

W. D. Cutrer and J. R. Bacot were appointed a committee to check up the old books of former mayor Clark, and the books of F. L. Smith, Secretary of the Board of City Governors.

There being no further business, a motion to adjourn prevailed.

J. J. PRICE, *Clerk.*
WALTER CLARK, *Mayor.*

Be it remembered, that the Board of Mayor and Aldermen of the Town of Clarksdale, met in special session at the office the Mayor, on Monday evening July the 11th in pursuance to the lowing call:

J. R. Bacot, G. P. Clark, W. D. Cutrer, J. A. Dolan, and Al Nachman, Aldermen:

You are hereby notified that there will be a special meeting of the ard of Mayor and Aldermen of the Town of Clarksdale this 11th of July, 1898, at eight o'clock P. M. for the purpose of providing the payment of the town's debt, and for the election of a City Assessor and the making an assessment roll:

(Signed) WALTER CLARK, *Mayor.*

Executed by personal service on the above aldermen, this July 11th, 11 o'clock A. M. Except Al Nachman.

(Signed) W. H. McCROY, *Marshal.*

George Alcorn was elected City Tax Assessor at a salary of twenty five dollars, and instructed to make a thorough assessment of all real and personal property, within the corporate limits. The City Attorney prepared the following, recognizing the City's indebtedness of twenty five thousand dollars, as follows:

Whereas, the indebtedness claimed against the Town of Clarksdale, on account of an issue of twenty five thousand dollars of six percent bonds, dated January the 15th, 1891, to the L. N. O. & T. Rail Company, and interest accrued thereon, which said indebtedness was held forty per cent by R. T. Wilson & Company and sixty per cent by the Pacific Improvement Company, has been compromised by the payment of twenty five thousand dollars, under the terms of a compromise settlement made with said parties by E. I Anderson, W. P. Holland and J. W. Cutrer, a committee appointed by the citizens and tax payers of this town, for that purpose, a copy of the papers evidencing which settlement has been filed with the clerk of this board, and whereas, this board ratifies said settlement and now desires to carry out the terms of said settlement, as stated, and provide funds for the payment of said debt, by the issuance of a new series of twenty five thousand dollars of the bonds of this town, it is therefore ordered and ordained that a committee composed of Aldermen Bacot and Dolan be and it is hereby appointed to negotiate the sale of twenty five thousand dollars of bonds of this town, upon the best terms attainable, subject to the approval of this Board, and to report their action to this board at the earliest practicable day.

There being no further business a motion to adjourn prevailed.

J. J. PRICE, *Clerk.*

[SEAL.] WALTER CLARK, *Mayor.*

46 Jan. 14, 1899.

Be it remembered that the Board of Mayor and Aldermen met in special session this the 14th day of January, 1899, at the mayor's office in Clarksdale, Mississippi, pursuant to the following call.

To W. H. McCroy, Marshal:

You are hereby directed to summon the following named aldermen J. A. Dolan, J. R. Bacot, W. D. Cutrer, Paul Clark and Al Nachman, to attend a special meeting of the board of Mayor and Aldermen to be held at twelve o'clock, Noon, for the purpose of providing for the payment of R. R. Bond interest due Jan. 15, or passing on application for building permits and of allowing sundry accounts duly filed. 8.30 A. M.

(Signed) W. CLARK, *Mayor.*

Endorsed.

Executed by personal service on J. A. Dolan, J. R. Bacot, W. D. Cutrer, Paul Clark and Al Nachman, this Jan. 14, 1899 at 8.45 A. M.

(Signed) W. H. McCROY, *Marshal.*

Present and Presiding, W. Clark, Mayor, and J. A. Dolan, J. H. Bacot, W. D. Cutrer, Paul Clark and Al Nachman, when the following proceedings were had.

(Here follows order granting building permits.)

[SEAL.]

47 In the Matter of the Settlement of the Past-due Coupons upon Bonds Issued by the City of Clarksdale, on January the 15th, 1891, to the Louisville, New Orleans & Texas Railway Company.

#66.

The Committee appointed by this Board at the meeting thereof held on July the eleventh to negotiate a sale or arrange for placing the old debt of the City of Clarksdale, due on twenty five bonds of one thousand dollars each, issued to the Louisville New Orleans & Texas Railway Company, have reported to this Board that, they have arranged to place the original bonds now held by the Planters Bank upon the following terms:

That is to say at the time the said Planters Bank paid out for the said bonds, to-wit, on June 30th, 1898, $25,000.00, there was accruing interest due thereon and at the time the said committee made said agreement with said Planters Bank, there was accrued interest on said bonds to the amount of eight hundred sixteen dollars, and sixty cents, which said sum it was agreed should be paid to the said Planters Bank, at the maturity of the coupons attached to said bonds, to-wit, January the 15th, 1899, there was also due thirty seven dollars, fifty cents as exchange in the payment made in taking up said bonds, and one hundred dollars, expenses incurred in and about said transaction, amounting to the sum of nine hundred and fifty four dollars, and ten cents, all told, and whereas, by said agreement, it was understood that said Planters Bank should retain sixteen of the said coupons, maturing on January the 15th, 1899, aggregating the sum of $860.00, and should pay into the Treasury of the Town of Clarksdale, the sum of five dollars, ninety cents, to cover the difference between the amount called for by said coupons and the amount due said Bank at the time of the settlement made by the committee aforesaid, and up to January the 15th, 1899.

Now, therefore, it is ordered that, upon the said Planters Bank surrendering to the Board of Mayor and Aldermen twenty five cou-

pons maturing January the 15th, 1899, the Clerk is ordered
48 to draw his warrant upon the treasurer for the sum of nine
hundred and fifty four dollars and ten cents and the said
Planters Bank having heretofore delivered to this Board of Alder-
men all of said coupons maturing January 15th, 1899, except sixteen
and having now delivered to the Board the said sixteen coupons, i
is ordered that the warrant aforesaid be directed to issue in favor of
said Bank, under the terms of settlement made for and on behalf of
the Town of Clarksdale with the Pacific Improvement Company and
R. T. Wilson & Company, all past due coupons maturing at any time
prior to January the 15th, 1891, having been agreed upon to be can-
celled and satisfied and the seventy nine of said past due coupons
described as follows, to-wit:

Coupons on bonds, No. one to ten inclusive, due January the 15th
1898, coupons on bonds number eleven to sixteen inclusive due Jan
uary the 15th, of the years 1895, 1896, 1897 and 1898, and coupon
from bonds number seventeen to twenty five maturing January the
15th, 1895, 1896, 1897, 1898 and 1899, aggregating seventy nine
coupons, the said coupons are all ordered cancelled and destroyed.

As to the remainder of the said coupons past due the said Planters
Bank now delivers to the said Board of Aldermen an agreement and
contract with the said Pacific Improvement Company and R. T. Wil
son & Company by which all past due coupons upon the bonds afore
said were transferred and delivered to the said Planters Bank and the
Board of Aldermen accepts said obligation as to the transfer and in
satisfaction of said coupons, and discharges said Planters Bank from
any further liability with regard to same, it being understood, how
ever, that the said Planters Bank as the *assigguee* of all of said cou
pons, and the judgment rendered thereon shall deliver to the Board
of Aldermen an authority to the clerk of the circuit court of the
United States for the Western Division of the Northern District a
Oxford, to satisfy any and all judgments rendered upon any of said
coupons and to dismiss any and all suits pending upon the same.

Any costs, however, attending the said suits to be borne by
49 the town of Clarksdale so far as said costs have not heretofore
been paid and so far as the said Planters Bank is concerned
but the costs attending the dismissal of any suits pending under the
agreement hereinbefore referred to is to be borne by the plaintiffs
therein, the Pacific Improvement Company or R. T. Wilson & Com
pany, as the case may be, and for the better identifying of the con
tract delivered under this order, by the Planters Bank to the Board
of Aldermen ex*d*cuted by the Pacific Improvement Company and
the said R. T. Wilson & Company, the said contract and agreement
is made a part of this order, and the same is copied herein at length
the same being in words and figures following, to-wit:

In consideration of the payment to us the Pacific Improvement
Company and R. T. Wilson & Company, by the Planters Bank of
Clarksdale, Mississippi, of the sum of twenty five thousand dollars
($25,000.00), cash in hand on this day, we, the said Pacific Im
provement Company and R. T. Wilson & Company hereby transfe

set over and assign to the said Planters Bank the full issue of twenty five thousand dollars ($25,000.00) of bonds issued by the City of Clarksdale, to the Louisville, New Orleans & Texas Railway Company and payable to the said company or bearer, said bonds being six per cent bonds, together with all unpaid, past due coupons, originally attached to said bonds and all maturing coupons, attached thereto. This transfer includes the transfer and assignment of a certain judgment rendered in favor of the Pacific Improvement Company on certain of past due coupons against the City of Clarksdale, rendered by the Circuit Court for the Western Division of the Northern District of the United States at Oxford, Mississippi, and also all pending suits upon any of said past due coupons, in favor of either of us.

All costs which have been paid by us up to date we assume, and all other costs to be assumed by the Planters Bank except the costs in the suit of R. T. Wilson & Company vs. the City of Clarksdale, now pending which is to be dismissed at once at plaintiff's cost. In testimony whereof we have hereunto set our hands in triplicate on this the 30th day of June, 1898.

50

PACIFIC IMPROVEMENT COMPANY,
By I. C. GATES, *Asst. Secy.*
R. T. WILSON & COMPANY,
By J. M. EDWARDS, *Attorney.*

I certify that the foregoing is a true and correct copy of the said original agreement now in my possession.

AL NACHMAN, *Clerk.*

There being no further business before the Board a motion to adjourn prevailed.

WALTER CLARK, *Mayor.*
[SEAL.] AL NACHMAN, *Clerk.*

51 STATE OF MISSISSIPPI,
Coahoma County:

I hereby certify that the foregoing and attached 9 pages contain true, accurate and correct copies, taken from and as shown on Minute Books of the Town, now City of Clarksdale, Coahoma County, Mississippi.

Witness my signature, as Clerk of the said City of Clarksdale, last aforesaid, and my official seal, this the 25th day of May A. D. 1917.

[SEAL.] R. E. STRATTON, JR.,
Clerk of the City of
Clarksdale, Mississippi.

Endorsed on the back of the foregoing instrument is the filing thereof, which filing is in words and figures following to wit:

"Filed June 12, 1917.
S. F. CARR, *Clerk,*
By S. L. DODSON, *D. C.*"

52 *Summons.*

Returnable on a Rule Day. Chancery Court. (Box 286.) T.

THE STATE OF MISSISSIPPI:

To the Sheriff of Coahoma County, said State:

You are hereby commanded to summon city of Clarksdale if to be found in your County, to appear before the clerk of the Cahncery Coirt of the County of Coahoma, in the State of Mississippi, on a Rule day of said Coirt to be held at the office of said Clerk on the second Monday of July A. D. 1917, in the City of Clarksdale, Miss., then and there to plead, answer or demur to the ans er and cross bill, this day filed by the Y. & M. V. Railroad Company, to which it is defendant. And have then and there this writ.

Given under my hand and the official seal of this Court, and issued this the 12th day of June, A. D. 1917.

[DEAL.]

S. F. CARR,
Clerk of the Chancery Court,
By S. L. DODSON, *D. C.*

This foregoing instrument is ground among the papers but is not actually marked "filed."

53 STATE OF MISSISSIPPI,
County of Coahoma:

In the Chancery Court, Second Court District.

CITY OF CLARKSDALE, MISSISSIPPI, Complainant,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendant.

To the Honorable Joe A. May, Chancellor, etc.:

Comes the City of Clarksdale, complainant, in this its answer t the cross bill, so called, filed herein against it in connection with th answer of the Yazoo & Mississippi Valley Railroad Company file June 12th, 1917, and answering so much of the said cross bill as i the said City of Clarksdale, is advised is necessary and proper so t do, and without waiving *and* objection to the many errors, inac curacies and imperfections of the said cross bill as to the form an contents thereof, but specially reserving the objections and exceptio thereto, answering, says:

I.

Complainant supposes that the cross bill of defendant, the Yazoo Mississippi Valley Railroad Company, commences with section

article X of the answer of the said Yazoo & Mississippi Valley Railroad Company, and commences the answer to said cross-bill with the said article or section of said answer.

II.

Cross-defendant admits that during the fall of the year 1889 the Louisville, New Orleans & Texas Railway Company owned and operated a line of railroad extending from Memphis, Tennessee through Clarksdale, Mississippi, to New Orleans, Louisiana, and that said line of railroad is the present main line of cross-complainant; that the City of Clarksdale and the citizens thereof were
54 desirous that a branch line of railroad should be constructed, running in an eastern or southeastern direction from Clarksdale down the Tallahatchie River and its confluents, to be known as the Tallahatchie Branch of the Louisville, New Orleans & Texas Railway Company, and that negotiations took place between the officers of the Louisville, New Orleans & Texas Railway Company and the City of Clarksdale, and the citizens thereof, the result of which was that on October 19th, 1889, James M. Edwards, the then Vice-President of the Louisville, New Orleans & Texas Railway Company, addressed a letter to the Mayor and Aldermen of the Town of Clarksdale, in which it was stated that it had been represented to him that in consideration of the location and construction of the said Tallahatchie Branch from the main line at Clarksdale, or within one-half mile of the then depot at Clarksdale, the Town of Clarksdale would subscribe $25,000.00 to the stock of said branch road and would guarantee the railroad company the right of way from Clarksdale, or from the junction point near Clarksdale, to the boundary line of Coahoma County, said stock to be paid for with $25,000.00 (par value) of bonds of the City of Clarksdale, bearing interest at the rate of six per cent per annum, and the said Edwards requested that proper steps be taken for submitting to the vote of the citizens of Clarksdale the question of the subscription.

That thereupon the Board of Mayor and Aldermen of the Town of Clarksdale unanimously passed an ordinance fixing November 25, 1889, as the date for the vote to be taken on said subscription and on said date an election was held, and the result was that all the votes cast favored the subscription and no vote was cast against the subscription. That thereafter on November 26th, 1889, the Board of Mayor and Aldermen of the City of Clarksdale after canvassing the returns of said election ordered the Mayor of Clarksdale to subscribe in the name of the City of Clarksdale for $25,000.00 of the stock of said railroad company, and said Board further ordered that
55 the bonds of the City of Clarksdale should be lithographed and executed by the Mayor of the City of Clarksdale and that after said bonds had been prepared and executed, said Board directed that the same should be delivered to the Clarksdale Bank & Trust Company, of Clarksdale, as Trustee, and that said Trustee was to deliver said bonds to said railroad company when said Tallahatchie

Branch was constructed and opened for business to the southeast or eastern line of Coahoma County.

That thereupon said railroad company proceeded to construct said Taliahatchie Branch and did construct same and opened same for business and began operating same, and said branch has since said time been in continuous operation.

That in conformity with the action of the citizens of Clarksdale as expressed in said election and in conformity with the action regularly taken by the Board of Mayor and Aldermen of the City or Town of Clarksdale twenty five bonds of the City of Clarksdale, each of the par value of $1,000.00, dated January 15th, 1891, and maturing twenty years after date, and bearing interest at the rate of six per cent (6%) per annum, payable on January 15th, of each year, were deposited with the Clarksdale Bank & Trust Company, as Trustee for the City of Clarksdale, to be exchanged for two hundred and fifty shares of stock in the Louisville, New Orleans & Texas Railway Company, each share of said stock being of the par value of One Hundred Dollars. That on April 29th, 1891, the Louisville, New Orleans & Texas Railway Company delivered to said Trustee its certificate No. 147 for two hundred and fifty shares of stock (each share being of the par value of $100.00), and on May 13th, 1891, said Clarksdale Bank & Trust Company, as Trustee for the City of Clarksdale, delivered to said railroad company the twenty five bonds of the City of Clarksdale above mentioned, and the exchange of the stock and bonds was thus completed as contemplated.

But cross-defendant denies that after said time the said bonds were disposed of by said railroad company in due course of business, and the Pacific Improvement Company, a corporation of the State
56 of California, and R. T. Wilson, a citizen of New York, became the owners of said bonds.

Cross-defendant neither denies or admits that the City of Clarksdale failed to pay the interest on said bonds and on August 4th, 1894 the Pacific Improvement Company filed a suit against the City of Clarksdale in the United States Circuit Court for the Northern District of Mississippi, said suit being *the* recover upon the unpaid coupons on the bonds owned by the Pacific Improvement Company. That said suit was entitled "Pacific Improvement Company vs. City (Town) of Clarksdale." That said suit was contested by the City of *the* Clarksdale, various defences being presented, and upon the trial of the said cause there was a verdict and judgment in favor of the City of Clarksdale on the 14th day *fo* June, 1895. That said *cause* was thereupon taken by appeal or writ of error to the United States Circuit Court of Appeals for the Fifth Circuit and by the said Court the judgment of the United States Circuit Court for the Northern District of Mississippi was reversed and said cause remanded for a new trial. That the opinion of the court in reversing said cause is set out in the case entitled "Pacific Improvement Company vs. The City or Town or Clarksdale," 74 Federal Reporter Page 528. That upon a reversal and remand of said cause the same was again tried and on June 2, 1896, there was verdict and judgment in favor of the Pacific Improvement Company against the

Town of Clarksdale for Three Thousand, Fifty Eight and 13/100 Dollars. That thereupon said cause was taken to the United States Circuit Court of Appeals for the Fifth Circuit by appeal or writ of error and in said court said judgment in favor of the Pacific Improvement Company and against the City of Clarksdale was affirmed. That the opinion of the Circuit Court of Appeals in affirming said judgment is reported in 81 Federal Reported, Page 329. But cross-defendant calls for strict proof of any and all of said allegations if the same be in any way material.

57 Cross-defendant denies, as alleged in the answer of the Yazoo & Mississippi Valley Railroad Company, that said judgment was not paid by the City of Clarksdale, and that by virtue of a writ of execution issued in said cause, the said certificate of stock, which was still in the hands of the Clarksdale Bank & Trust Company, as Trustee for the City of Clarksdale, was levied on by the United States Marshal, and was by the United States Marshall sold on December 6, 1897, to the Pacific Improvement Company for the sum of One Hundred Dollars, and thereby the said Pacific Improvement Company became the owner of the two hundred and *d*ifty shares of stock in the Louisville, New Orleans & Texas Railway Company which had originally belonged and been the property of the City of Clarksdale.

Cross-defendant denies that the said credit of One Hundred Dollars upon the judgment in favor of the Pacific Improvement Company left a greater portion of said judgment unpaid and thereupon steps were taken by the City of Clarksdale to escape the payment of said judgment and the obligations of the bonds of said City; that the officers of said City resigned so as to leave no one upon whom process would be served and an effort was made in the Legislature of the State of Mississippi of 1898 to pass an act to provide for the government of municipalities which were without municipal officers. That said bill failed of passage, but the municipality of Clarksdale continued without municipal officers from about January 1, to July 11, 1898.

Cross-defendant neither admits nor denies that R. T. Wilson also brought suit in the United States Circuit Court for the Northern District of Mississippi to recover judgment on the coupons of bonds owned by him, but said suit was never brought to trial; but if such facts are material then cross-defendant calls for strict proof thereof.

Cross-defendant neither admites nor denies that during said period when the municipality was without officers and without any one to represent said municipality, several prominent citizens of

58 the municipality, acting on their own responsibility and in their individual capacity, took steps to reach some adjustment with the Pacific Improvement Company and R. T. Wilson, the owners of the bonds of said municipality. That the result of these efforts on the part of said individual citizens was that a committee, consisting of W. P. Holland, J. W. Cutrer, and E. L. Anderson, went to New York City in June, 1898, to confer with the owners of said bonds; that said committee was acting in its individual capacity, or as representing interested individual citizens and was not repre-

senting the municipality of Clarksdale, for said municipality at said time had no municipal officers to act or take steps for it. That the said conference in New York was held and as a result thereof the said Committee paid to the owners of said bonds, the Pacific Improvement Company and R. T. Wilson, the sum of Twenty Five Thousand Dollars in cash and the owners of the bonds set over and assigned to the Planters' Bank of Clarksdale (which had advanced said $25,000.00), the said $25,000.00 of bonds issued by the City of Clarksdale, together with all matured and unmatured coupons; but if such facts are material, then cross-defendant calls for strict proof of the same; but cross-defendant avers that the Planters' Bank, acting as agents and trustees, for the City of Clarksdale, did, on or about the 30th day of June, 1898, pay to the Pacific Improvement Company and R. T. Wilson & Company the sum of $25,000.00 in cash in settlement of any and all claims of the Pacific Improvement Company and R. T. Wilson & Company as against the City of Clarksdale; and that said settlement was set forth in the agreement in writing, which was as follows:

"In consideration of the payment to us the Pacific Improvement Company and R. T. Wilson & Company, by the Planters' Bank of Clarksdale, Mississippi, of the sum of twenty five thousand dollars ($25,000.00), cash in hand on this day, we, the said Pacific Improvement Company and R. T. Wilson & Company hereby transfer and set over and assign to the said Planters' Bank the full issue of twenty five thousand dollars ($25,000.00) of bonds issued by
59 the City of Clarksdale to the Louisville, New Orleans & Texas Railway Company and payable to the said company or bearer, said bonds being six per cent bonds together with all unpaid, past due coupons, originally attached to said bonds and all maturing coupons, attached thereto. This transfer includes the transfer and assignment of a certain judgment rendered in favor of the Pacific Improvement Company on certain of past due coupons against the said City of Clarksdale, rendered in the circuit Court for the Western Division of the Northern District of the United States at Oxford, Mississippi, and also all pending suits upon any of said past due coupons, in favor of either of us.

All costs which have been paid by us up to date we assume. All other costs to be assumed by the Planters' Bank except the costs in the suit of R. T. Wilson & Company vs. the City of Clarksdale, now pending which is to be dismissed at once at plaintiff's cost.

In testimony whereof we have hereunto set our hands in triplicate on this the 30th day of June, 1898.

PACIFIC IMPROVEMENT COMPANY,
By I. C. GATES, *Asst. Secy.*
R. T. WILSON & COMPANY,
By J. M. EDWARDS, *Attorney.*"

60 Cross-defendant denies that in said transaction the owner of said bonds lost about Ten Thousand Dollars of interest by

reason of the delivery to said Planters Bank of said bonds, together with the coupons. That the said certificate of stock is not mentioned in said agreement and was not returned by the said Pacific Improvement Company to the said committee or to the Planters Bank nor was it contemplated by any of the parties that it should be returned. Cross-defendant denies that at the time of said settlement in New York the said certificate in question was in the possession of the Pacific Improvement Company in its office in New York and after said settlement said Pacific Improvement Company continued to hold said certificate and it continued to remain the property of said Pacific Improvement Company until October 4, 1904, and when said certificate was sold by the said Pacific Improvement Company in due course of business to the Mississippi Valley Company. That thereupon the said Mississippi Valley Company delivered said certificate to the Yazoo & Mississippi Valley Railroad Company and received in lieu thereof a certificate for the two hundred and fifty shares in the Yazoo & Mississippi Valley Railroad Company, said certificate reading in the name of the Mississippi Valley Company and said certificate is still in the possession of the Mississippi Valley Company, which is still the legal owner and holder thereof; but cross-defendant specifically denies any ownership, right or title therein to the said Mississippi Valley Company; but if such facts are material, then the cross-defendant calls for strict proof of the same, and in this connection cross-defendant alleges and avers that even if such facts were true, as stated, the said Pacific Improvement Company, by said sale as alleged, could not have in any way become the owner of the share or interest of the cross-defendant in the said Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Railroad Company; nor did the Yazoo & Mississippi Valley Railroad Company have any right or authority in law to issue to the said Mississippi Valley Company any certificate of stock in
61 the said Yazoo & Mississippi Valley Railroad Company by virtue of the surrender and delivery of said stock Certificate Number 147, or for any other reasons.

Cross-defendant neither denies nor admits that after this settlement by said committee in New York, the City Government of Clarksdale was reorganized on July 11, 1898, and neither admits nor denies the authority or legality or existence of Exhibit "A" or the original thereof, nor denies or admits anything which the minutes of the meeting of the Board of Aldermen and Mayor of said municipality of the City of Clarksdale of January 14th, 1899, contains, but if such facts are material calls for strict proof of the same.

Cross-defendant denies that it is apparent that the City or Town of Clarksdale has no interest in the Louisville, New Orleans & Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company and is not entitled to have any stock in the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company issued to it and is furthermore not entitled to any accounting or to the value of any stock.

Cross-defendant denies that the Louisville, New Orleans & Texas Railway Company stock originally issued to the City of Clarksdale

was sold under judicial sale and purchased by the Pacific Improvement Company and that if the City of Clarksdale, the complainant in this case, has any claim to said stock, said claim necessarily arises through assignment of the Planters Bank to the City of Clarksdale, and that the Planters Bank is barred by the statute of limitations as to any claim relative to said stock, and that likewise that City of Clarksdale as assignee of the Planters Bank is barred and that said claim has been in existence since Jan. 30, 1898, and denies that a statute of limitations of any kind in the State of Mississippi has any bearing or effect on this cause.

Cross-defendant denies that it has been guilty of any laches and that it is not entitled to any relief in a Court of Equity.

62 Cross-defendant further denies that in asserting its claim for stock in the Louisville, New Orleans & Texas Railway Company, or claim to an accounting, or to the value of the stock formerly owned by it in the Louisville, New Orleans & Texas Railway Company, was and is acting in a private and not a governmental capacity, and is barred by the statute of limitations as above set out; and denies that it has also been guilty of such laches as to repel it in equity; and denies that it is also estopped by its acquiescence for nearly nineteen years in the ownership of said stock by the Pacific Improvement Company and its vendee, The Mississippi Valley Company, to now set up a rightful claim to said stock, or to a certificate representing the same, or to an accounting, or to a value of said stock. Cross-defendant denies that after all of said period of nearly nineteen years when complainant has known that said stock was in the possession of the Pacific Improvement Company by virtue of said judicial sale, and that said Pacific Improvement Company claimed the ownership in and title to said stock, and after the claim of complainant to said stock or to be a stockholder in respondent, the Yazoo & Mississippi Valley Railroad Company has been repeatedly denied by it, it is now too late for complainant to assert any right to said stock.

II-.

Cross-defendant denies that cross-complainant, the Yazoo & Mississippi Valley Railroad Company, is entitled to any of the relief prayed for in section XI of the answer of said Yazoo & Mississippi Valley Railroad Company filed herein June 12th, 1917, and denies that the said Yazoo & Mississippi Valley Railroad Company has any right to any relief either in equity or law, and denies that the said Yazoo & Mississippi Valley Railroad Company has any right or privilege, either in equity or law, to ask for any relief whatever in this cause.

63 And now having fully answered the cross-bill, or so much thereof, as is material and necessary, as cross-defendant is advised, cross-defendant prays for the relief asked for in the original bill filed herein, and for costs in this behalf expended.

IV.

And now comes the complainant and prays the Court to be allowed to amend its original bill, in this particular to wit, in that the Mississippi Valley Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Mississippi may be made a party to the original bill herein, as well as to this cross bill and amended bill, and for cause alleges that it appears from the answer of the said Yazoo & Mississippi Valley Railroad Company, respondent and cross-complainant, that the Mississippi Valley Company, a corporation organized and existing, as aforesaid, with Charles H. Markham, President, R. D. Burbank, Secretary and A. J. Wykes, Treasurer, and with domicile at Water Valley, Mississippi, has some pretended or alleged claim to the interest, share or stock of the complainant, the City of Clarksdale, in the Yazoo & Mississippi Valley Railroad Company or the Louisville, New Orleans & Texas Railway Company, and in order that all parties necessary for complete relief herein may be made parties hereto, that summons may issue herein commanding the Mississippi Valley Company to appear at the next regular term of this Court to be held in the City of Clarksdale on the Fourth Monday in October, 1917, then and there to plead, answer or demur to the Original Bill and Amended Bill herein filed, but not under oath, the oath or oaths to any answer, or answers filed herein being expressly waived, and upon the final hearing hereof complainant prays in addition to the relief asked for in the Original Bill filed herein that any claim of pretended or alleged title or claim of the said Mississippi Valley Company in and to the interest, share or stock of the complainant, the City of Clarksdale, in and to the corporations known as the Louisville, New Orleans & Texas Railway Company and the
64 Yazoo and Mississippi Valley Railroad Company be cancelled and declared null and void by this court, and in this connection complainant alleges and charges that the said Mississippi Valley Company has no valid or legal claim or title to any interest, shares or stock of the said complainant, the City of Clarksdale, in and to either of the corporations, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company; but that the said alleged or pretended claim is fictitious, fraudulent, and void.

V.

And complainant, reiterating the prayer for relief in its original bill herein as against both the Yazoo and Mississippi Valley Railroad Company and the prayer in the amended bill filed as against the Mississippi Valley Company, prays for such other further or general relief as the case may require and as to equity may seem meet.

And as in duty bound, will ever pray, etc.

MAYNARD & FITZGERALD,
Attorneys for Cross-defendant.

R. E. STARTTIN, Jr.,
City Clerk.

STATE OF MISSISSIPPI,
County of Coahoma:

This day personally appeared before me, the undersigned a duly qualified and acting notary public within and for the County and State aforesaid, R. E. Stratton, Jr., City Clerk of the City of Clarksdale, who having been by me first duly sworn, states on oath that the matters and facts alleged and in the foregoing bill are true as therein stated.

Witness my hand and Official seal, this the 16th Day of August 1917.

P. L. WALDROP,
Notary Public.

Endorsed on the back of the foregoing instrument is the filing thereof, which said filing is in words and figures following, to-wit: S. F. Carr, Chancery Clerk. S. L. Dodson, D. C.

65 STATE OF MISSISSIPPI,
County of Coahoma:

In the Chancery Court, Second Court District.

CITY OF CLARKSDALE, Complainant,

vs.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Defendant.

Answer of the Mississippi Valley Railroad Company.

Respondant, The Mississippi Valley Company, for an answer to the original and so called amended and cross-bill filed against it in this cause by the City of Clarksdale, for an answer to so much of said bills as it is advised it is material to answer, admits that it is a corporation orginazed and existing under the laws of the State of Mississippi, and has been such for many years, and that its principal place of business is Water Valley, Mississippi, where its corporate meetings are held and its corporate business transacted.

Respondent admits that the complainant is a municipal corporation orginazed and existing under the Laws of the State of Mississippi, but denies that complainant is a sub-division of said State. Respondent further admits that the Yazoo and Mississippi Valley Railroad Company is a railroad corporation orginazed and existing

nder the Laws of the State of Mississippi, with lines of railroad nd offices in Clarksdale, Mississippi, and in Coahoma County, Mississippi.

I.

Respondant denies that complainant is now and has been ever ince April 29, 1891, the legal and equitable owner of 250 shares f the capital stock of the Louisville, New Orleans & Texas Railway ompany, of the par value of $100.00 a share, as evidenced by a opy of stock certificate No. 147 which is attached as exhibit A to he original bill.

Respondent admits that on April 29, 1891, the Louisville, New rleans & Texas Railway Company was a railroad corporation or-anized under and doing business by virtue of the Laws of the State of Mississippi, but respondant is without any knowledge as to the purchase, as to whether the consideration paid was full, adequate and valuable one, and this respondant demands proof of these matters be deemed material.

II.

Respondant admits that on October 25, 1892 the Louisville, New rleans & Texas Railway Company and the Yazoo and Mississippi alley Railroad Company were consolidated and respondant assumes that the Articles of Consolidation are correctly set out as Exhibit "B" to complainant's bill, but demands proof of same to be eemed material.

III.

Respondant is without knowledge as to whether at the date of id consolidation the complainant was the owner of 250 shares of tock in the Louisville, New Orleans and Texas Railway Company s evidenced by Exhibit A to the complainant's bill, and respondant s without any information as to whether complainant became by irtue of said consolidation a stockholder in the Yazoo and Mississippi Valley Railroad Company, and is without any knowledge as whether at said time the complainant owned or possessed any nterest in consolidated company, or in either of said consolidated ompanies.

Respondant, however, denies that, if it be a fact that complainnt at said time owned 250 shares of stock in said consolidated ompany, said stock was, at the time of said consolidation, exceedngly valuable and worth exceeding $25,000.00, and respondant enies that at the present time the actual value of 250 shares of tock in the Yazoo and Mississippi Valley Railroad is in excess of 75,000.00, and respondant avers that the value of said stock both t the time of said consolidation and now is exceedingly small.

IV.

Respondant denies in toto all the allegations contained in Section 4 of complainant's bill, in which it is claimed that the stock which it originally had in the Louisville, New Orleans &
67 Texas Railway Company has never been sold or dispose- of or transfer-ed and in which it is claimed that complainant is now and has been ever since April 29, 1891, the true legal and equitable owner of 250 shares of stock in the Louisville, New Orleans & Texas Railway Company as evidenced by stock certificate No. 147, copy of which is attached as Exhibit "A" to complainant's bill.

Likewise respondent denies that complainant is now the owner of 250 shares of stock in the Yazoo & Mississippi Valley Railroad Company by reason of the certificate Exhibit A to the original bill, claimed to have been issued to it in 1891.

V.

Respondent denies in toto all the allegations contained in section 5 of the original bill, i- which it is claimed that said stock certificate No. 147, Exhibit A to this bill, has been lost, mislaid or destroyed, or wrongfully or illegally withheld from complainant and in which it is claimed that diligent search has been made by complainant for said certificate.

VI.

Respondent is without any knowledge as to the matters alleged in section 6 of complainant's bill, and being without knowledge, respondent denies all the allegations contained in said section of the bill, but respondent avers that if any application for the issue of stock to complainant is made by complainant to the Yazoo & Mississippi Valley Railroad Company as alleged in this section, said application is without merit, and should have been refused.

VII.

Respondent admits that the Louisville, New Orleans & Texas Railway Company has merged its identity with the Yazoo & Mississippi Valley Railroad Company and on information and belief respondent admits that the Louisville, New Orleans & Texas Railway Company has no office or agent in the State of Mississippi, and, indeed, no longer exists.

68 VIII.

Respondent is without knowledge as to whether complainant is ready and willing to issue an indemnity bond to the Yazoo & Mississippi Valley Railroad Company to hold said railroad company harmless in consideration of said railroad company issuing to com-

Respondent now says that whatever, if any, interest the complainant had in certificate No. 147 or the stock represented by it, plainant a certificate for 250 shares of stock in said railroad company. Respondent, however, denies that complai-ant is entitled to any stock issued to it in said railroad company by reason of the matter set forth in complainant's bill.

IX.

Respondent denies that complainant has no plain, adequate and complete remedy at law to enforce the rights claimed by it in its bill, and r-spondent desnies that complainant is entitled to have issued to it any evidence of stock ownership in the Yazoo & Mississippi Valley Railroad Company by reason of t-e matter set forth in complainant's bill, or for any reason so far as respondent knows, and respondent denies that complainant is entitled to have an accounting with said railroad company to ascertain the extent and value of the interest claimed by complainant in said railroad company and respondent denies that complainant is entitled to a decree in its favor against said railroad company for the value of sais stock claimed to be owned by complainant.

X.

And now, having answered the several allegations contained in complainant's bill, for further answer to said bill and to the so called cross and amended bill filed by complainant, respondent says that on October 4, 1904, respondent, in due course of business, purchased from the Pacific Improvement Company and paid a valuable consideration, to wit, $2777.50, for 250 shares of stock in the Louisville, New Orleans & Texas Railway Company, and that said purchase covered the said 250 shares of stock represented by stock certificate No. 147, which is Exhibit "A" rto complainant's bill, and that at the time of said sale said Pacific Improvement Company was the true and legal owner of certificate No. 147, and lawfully transferred said certificate to this respondent and this respondent, thereupon, upon the same date, to wit, October
69 4, 1904, delivered said certificate to the Yazoo & Mississippi Valley Railroad Company and received in lieu thereof a certificate for 250 shares of stock in the Yazoo & Mississippi Valley Railroad Company, and respondent has been since said date and is now the true and lawful owner of said 250 shares.

Respondent further states that the Pacific Improvement Company, had been the true and lawful owner of said 250 shares of stoc- represented by said certificate No. 147 ever since December 6, 1897 on which date the said Pacific Improvement Company purchased said stock and certificate *as* a judiciail sale had under and in pursuant of orders of the United States Circuit Court for the Western Division of the Northern District of Mississippi, in the cause entitled in said Court, Pacific Improvemrnt Company vs. City (or Town) of Clarksdale, Mississippi.

passed to said Pacific Improvement Company by virtue of said judicial sale and thereafter to respondent as above stated. Respondent denies the allegation contained in the amendment to the original bill to the effect that respondent's interest in said *in said* stock or stock certificate is pretended, fictitious or fraudulent, or void, and respondent denies that complainant is entitled to any of the relief prayed for by complainant against respondent, or against its co-defendant, the Yazoo & Mississippi Valley Railroad Company.

For further defense, respondent says that it has been the owner of said stock continuously since October 4, 1904, and that its ownership of said stock has been open, notorious and adverse, and that complainant is barred as to the relief prayed against respondent, not only by complainant's laches, but by the statutes of limitation of the State of Mississippi, of three years, six years, and ten years, and is now estopped to make any claim to said stock. Respondent further avers that a complete and full settlement as to any claim
70 of the City of Clarksdale to the said stock, or any claim accruing to the City of Clarksdale growing out of the issue of said stock was made by said city through its Board of Mayor and Aldermen as appears from the minutes of said Board of Mayor and Aldermen of July 11, 1898 and January 4, 1899 (certified copies of said minutes being attached to the answer of the Yazoo & Mississippi Valley Railroad Company filed in this cause), and that the said action of said City through its Board of Mayor and Aldermen completely and forever discharged and cancelled any claim of complainant, if any it then had, which this respondent denies.

And respondent further avers that complainant is asserting its claim to said stock and in its alleged ownership of said stock was and is acting in a private and not a governmental capacity, and is barred by the statutes of limitations as above set out, and has also been guilty of such laches as to deny complainant any relief in equity, and that complainant is estopped by reason of the matters herein alleged from now asserting any claim to said stock, or to have any of the relief prayed for by complainant.

And respondent for further defense to complainant's bill and so-called amended and cross-bill, relies upon and adopts as its own just as fully as if set out here, all the matters and defenses set forth in the answer of its co-defendant, the Yazoo & Mississippi Valley Railroad Company.

And now, having fully answered, respondent prays that this proceeding be dismissed as to it, with its reasonable costs in this behalf so unjustly sustained.

CHARLES W. BURCH,
H. D. MINOR,
D. A. SCOTT,
Solicitors.

Endorsed on the back of the foregoing instrument is the filing thereof. Which said filing is in words and figures following, to wit:

"Filed October 12, 1917."
S. F. CARR, *Clerk.*

71

D. A. Scott & E. M. Yerger,

Attorneys and Counsellors at Law,

Clarksdale, Coahoma County, Miss.

Representing

Y. & M. V. R. R. Co.,

Postal Telegraph Cable Co.,

Maryland Casualty Co.,

American Express Co.,

Fidelity & Deposit Co. of Maryland.

April 18, 1918.

In re City of Clarksdale vs. Y. & M. V. R. R. Co.

Mr. Louis L. Goings, Official Court Stenographer, Chancery Court, Sumner, Mississippi.

DEAR SIR: We beg to advise that all of the defendants in the above suit have prayed for and obtained an appeal from the adverse decree rendered against them on the trial of t-e above styled cause in the Chancery Court of the Second District of Coahoma County, Miss.

This is to request and instruct that you transcribe and extend your notes of all the evidence taken on the trial of said cause in the manner and within the time required by law.

We shall thank you to give this important matter your prompt attention.

Very truly yours,

D. A. SCOTT &
E. M. YERGER,
By L.

D. A. S./M.

c.-Mr. Y. E. Howell.

Endorsed on the back of the foregoing instrument is the filing thereof, which said filing is in words and figures as follows, to wit:

"Filed April 19, 1918.
Y. E. HOWELL, *Clerk*.
By WILLIAM A. TEMPLE, *D. C.*"

72 In the Chancery Court of Second District of Coahoma County, Mississippi, April Term, 1918.

No. 2006.

CITY OF CLARKSDALE

vs.

YAZOO AND MISSISSIPPI VALLEY RAILROAD CO.

Complainant's Attorneys: Maynard and Fitzgerald.
Defendant's Attorneys: Chas. N. Burch, H. D. Minor, and D. A. Scott.

Following is the testimony in the above styled cause:

Mr. Fitzgerald: Complainants introduce the articles of consolidation of the Louisville, New Orleans & Texas Railroad Company and the Y. & M. V. Railroad Company as shown by exhibit B attached to the original bill herein, same being a certified copy of the articles of consolidation, taken from the records of Coahoma County, Book J-2, page 501 et sequa., also exhibit A, which is not a certified copy, but is a copy of the certificate of stock, No. 147, issued by the Louisville, New Orleans & Texas Railway Company to the City of Clarksdale, which said copy was admitted as being correct by the answer of the defendant and the proposal made by the defendant in its answer to produce the original of the certificate.

Judge Minor: The defendant now objects to the copy of the certificate of stock, which is exhibit A to the original bill, for the reason that it appears on its face to be, and is in fact, a copy, and no reason is given for failure to produce the original and the original is the best evidence.

By the Court: My idea is that the allegations and admissions of the bill and answer is distinct from the proof. Of course, a thing that is not denied in the answer is admitted and goes as a part of the pleadings, but not as a part of the proof, but when it is sought to make an instrument a part of the proof, the original must be produced or one of the legal causes shown why it cannot be pro-

73 duced. I think the objection to the introduction of the copy as part of the proof in the case will be sustained, unless the complainant calls upon the defendant to produce the original and it is refused.

Counsel for plaintiff excepts.

Mr. Fitzgerald: We further introduce the answer of the Y. & M. V. Railroad Company, but do not introduce the exhibits thereto, as the same are denied specifically in the answer, and the answer of the Mississippi Valley Company.

Mr. Scott: To which the defendant objects as being incompetent, immaterial and irrelevant. We object now to all the evidence in-

troduced by complainants and move to exclude same; first, because the evidence is immaterial and incompetent; second, because under the pleadings as framed said evidence is wholly and entirely insufficient to support the recovery, or upon which to grant any relief prayed for by the complainant. I shall only stay in the court a few moments.

By the Court: It occurs to me that the argument has drifted far afield. The objection is to the evidence adduced on the trial as being incompetent, irrelevant and immaterial. The argument has been more on whether or not the complainant has made out a case. The question before the Court is whether or not the evidence is relevant and competent. The court has already held that the objection to the introduction of the copy of the certificate of stock should be sustained. The other part of the evidence introduced on the trial is in the opinion of the court competent and relevant. Whether or not proof taken together with the allegations of the bill and admission of the answer will permit the complainant to make out his case is a matter for the court to determine on final hearing after the complainant has rested his case. When you rest, then the court will determine whether or not what proof he has that is competent,
74 together with the allegations and admissions of answer warrants the court to decide the case. The question now is whether or not this part of the proof you object to is competent.

Mr. Fitzgerald: Complainant asks to reopen the case and introduce another witness, R. E. Stratton, Jr.

Counsel for defendant objects. Objection overruled. Defendant's counsel excepts.

R. E. Stratton, Jr.

Witness was introduced by complainant and after being duly sworn testified as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Mr. R. E. Stratton, Jr.?

A. Yes sir.

Q. What official position have you held with the city?

A. I am city clerk and tax collector.

Q. This suit is a suit by the City of Clarksdale against the Yazoo & Mississippi Valley Railroad Company for the possession of the stock, share or interest of the City of Clarksdale in and to the corporation known as the Louisville, New Orleans & Texas Railway Company, now consolidated as the Yazoo & Mississippi Valley Railroad Company. Have you had occasion at any time, Mr. Stratton, to look for the original stock certificate of either one of those corporations?

A. Yes sir. I have looked through all the papers of the City of Clarksdale and do not find any stock certificate.

Q. State where you have made such search?

A. I might state this: that in June, 1917, we moved to what is now the new city hall and moved all the papers into the new building, and in the new building I bought all new filing cabinets and devices and when we made this move I looked through all the papers, but didn't find any stock certificate of any kind.

Q. You are the custodian of those records?

75 A. Yes, sir.

Q. At whose instance did you make that search for that certificate?

A. At the order of the Board.

Judge Minor: Here is a paper consisting of one, two, three, four, five, six, seven, eight, nine, ten, 11 pages, which is certificate signed by R. E. Stratton Jr. This purports to show the record of the proceedings of the Board of Mayor and Aldermen of Clarksdale, Mississippi, of two meetings on July 11, 1898 and at a meeting of January 14, 1899. Please state, whether you made that certificate and it is a correct copy of the proceedings.

A. Yes sir. This is my signature.

Q. You made that at our instance?

A. Yes sir, and that is the city seal and my signature.

Q. When you looked for this certificate, did you find any evidence of this stock? If so, what?

A. I didn't find the stock certificate.

Q. Find anything to indicate the ownership of it by the city?

A. I looked for it but didn't find it.

Q. Didn't find the stock certificate or anything else?

A. No sir.

Mr. Fitzgerald: All you looked for was the stock certificate?

A. Yes sir.

Q. Didn't look through the minute book?

A. No sir, I only looked for the stock certificate.

Judge Minor: Please put your initials on the first *page* of this document, R. E. S. Jr.

A. I have initialed it with my initials, R. E. F. Jr.

Mr. Scott: The defendant objects to all of the evidence of witness Stratton as being irrelevant, incompetent and immaterial.

Objection overruled. Defendant's counsel excepts.

76 Mr. Fitzgerald is sworn.

Mr. Fitzgerald: I desire to state that the copy of the stock certificate attached to the bill was first found in the files of the city by me in the correspondence with Mr. W. A. Percy, who was at one time the attorney for the defendant—the Pacific Improvement Company, one of the parties mentioned; that afterwards it was verified by Mr. Vanderveer of New York City, who was the secretary for the Pacific Improvement Company, and at the same time, I requested from the Chief Counsel of the Y. & M. V., Mr. Blewett Lee, of Chicago, information in regard to this stock certificate, which was refused, and that I have made every endeavor on behalf of the City of Clarksdale

to procure the original stock certificate or a copy thereof before the date of this trial.

Mr. Scott: The defendant objects to all of this evidence of Mr. Fitzgerald as being incompetent, immaterial and irrelevant; second, because it does not prove or tend to prove any issue involved in this litigation.

By the Court: I think that part of his testimony in regard to the verification of the copy is incompetent, but the other part is competent.

(Defendant's counsel excepts.)

Judge Minor (interrogating Mr. Fitzgerald): And you say you made every effort. Did you ever in the course of this trial give the defendants notice to produce this certificate?

A. No sir, because I understood from you yourself that you would produce the original. I was in your office several weeks ago, at which time I asked you to let me see the original of the certificate which you said you had, but you said it probably had been sent to some other office, but you would produce it at the trial.

Q. But you never gave me notice to produce the certificate?

A. No sir.

Q. I hand you herewith what purports to be the original certificate. Will you kindly look at it and see if it is?

77 A. Shall I read it?

Q. I would be glad if you would.

A. This piece of paper says on its face "No. 147" on the left top and on the right top "250 shares Louisville, New Orleans & Texas Railway Company, shares of $100.00 each. This is to certify that City of Clarksdale, Mississippi, is entitled to 250 shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, transferable in person, or by attorney, on the books of the said Company, only on the surrender of this certificate for cancellation. In witness whereof, the said company has caused this certificate to be signed by its vice-president and secretary this 29th day of April, 1891. Louisville, New Orleans & Texas Railway Company by James M. Edwards, Vice-President. C. H. Bosher, Secretary" and on the left appears the seal "Louisville, New Orleans & Texas" and in the center "Railway Company" and written in red ink across the face "Converted October 4-04."

Q. Will you kindly read what is on the back?

A. "Pacific Improvement Company vs. No. 3900 law. City or town of Clarksdale, Mississippi in the Circuit Court of the United States for the Western District of the Northern District of Mississippi by virtue of a writ of fieri facies issued in said cause, I levied upon certificate of stock on August 3, 1897 and thereon December 6, 1897, pursuant to said execution and to a certain writ of venditioni exponcs, I in the manner provided by law sold this certificate of stock, all the interest of the city or town of Clarksdale in the stock of the Louisville, New Orleans & Texas Railway Company to the Pacific Improvement Company. Witness my signature this, the

6th day of December, 1897. A. J. Cooke, United States Marshal." Now the printed words on there "For value received, I hereby sell, assign and transfer unto —— —— shares of the capital stock of the Louisville, New Orleans & Texas Railway Company repre-
78 sented by the within certificate, and do hereby constitute and appoint —— —— true and lawful attorney — to in — to make and execute all necessary note- of assignment and transfer required by the regulations and by-laws of said company. In witness whereof I have hereunto set my hand and seal this — of ——, 08.

Q. That last part was printed?

A. As I so stated to the stenographer.

Q. I dare say that there is no objection to Mr. Goings looking at that certificate?

A. We will object, of course.

Q. Now, Mr. Fitzgerald, isn't the face of that correctly reproduced in your Exhibit A?

A. I find that Exhibit A to the original bill is exactly like it, except that in the first line of the body of exhibit A the word "the" before the City of Clarksdale should be stricken out and the letters "th" after the figures "29" and immediately preceding the words "day of April, 1891" should be stricken out, and I don't find upon exhibit A any of the writing which appears to be upon the back of this certificate or paper handed to me and I don't find the words written in red ink "Converted October 4-04" upon this exhibit A, and I also find on exhibit A is simply written the word "Seal" but on the paper handed me there appears to be the impress of the seal bearing the words "Louisville, New Orleans & Texas Railway Company."

Q. In other words, the face of this certificate is substantially the same on exhibit A in your bill, with the exception of two or three differences you have mentioned?

A. With the exception of the differences I have mentioned.

Q. Is this, or not, the original certificate of stock No. 147 which your bill avers was issued to the City of Clarksdale and which you are now suing to reclaim?

A. I do not know.

79 Q. Do you recognize the signature of Mr. Edwards on this?

A. No, sir. I do not.

Q. Did you say it was not his signature?

A. O-, no.

Q. Do you recognize the signature of A. J. Cooke on the back of it? United States Marshal?

A. I really don't know Mr. Cooke's signature? I never saw Mr. Cooke in my life.

Q. You have seen Mr. Cooke's signature on various papers of the Pacific Improvement Company vs. Clarksdale?

A. I judge it is his signature. I don't know.

Q. You do know from the examination of papers in the Pacific Improvement with the City of Clarksdale. You have never seen his signature on any of the court papers in the case of the Pacific Improvement vs. Clarksdale?

A. It probably is his signature. I don't know sir. I have seen s name written, though I don't like to answer. I simply took the and to testify in regard to the exception that was made to the copy d explain to the court. These other matters that have been ought out by you, I don't know anything about.

Q. I have in my hand the original certificate, No. 147, which is ferred to in your original bill of complaint in this case, and copy the face of which is made exhibit A to your bill. I now produce to you to give you the opportunity to introduce it in evidence if u desire.

A. Of course, I would very much prefer to have counsel placed der oath and subject to cross-examination before I would say that the original certificate, unless he knows of his own knowledge that is certificate of stock is the original.

Q. Please answer my question as if I had said I hold in my hand at purports to be the original certificate No. 147. (Witness does not answer.) Please answer the foregoing——

A. What is the question?

Q. I now offer you a paper which purports to be the original certificate of stock No. 147 referred to in the original bill of plaint in this case, the substantial copy of the face of which is ade exhibit A to the original bill. I produce that to you now as unsel for the defense in order that you may examine it and offer in evidence if you so desire.

A. Unsolicited, counsel has produced to me a paper which he asres me is the original of the certificate of the Louisville, New leans & Texas Railway Company, which I refuse to introduce as idence in this cause, because I first desire to interrogate counsel or ne member of his corporation who has the knowledge as to the nuineness of all the writings on this paper, who put them there, hen they were put there and for what purpose, because I would ly desire to introduce that that I am assured is the original and nuine paper; to wit, the original face of the certificate, and furer, I do not believe that counsel has the right to request me to roduce evidence for myself that he desires to get into the record.

Q. Mr. Fitzgerald, referring to paragraph one of your original l, do you not aver that exhibit A to the bill is a copy of certificate stock No. 147?

A. The bill shows for itself.

Q. Will you make this paper, this certificate of stock No. 147 ich you have just examined, exhibit A to your testimony in order at it may be identified, initialed in pencil on the upper right hand rner?

A. I noticed that you requested the clerk a few minutes ago to do at same thing. Do you mean yourself to make it an exhibit to y testimony, or do you now introduce it and wish me to identify it?

Q. I wish to make an exhibit to your testimony.

A. Well, I refuse to make it any exhibit to my testimony. If required by the Court, I will initial it.

By the Court: I think it is proper for the witness to make it an exhibit to his testimony, but he can disclaim any responsibility for the instrument that he desires.

(Witness:)

A. I here and now, at the request of the counsel for the defendant, the Yazoo & Mississippi Valley Railroad Company, place my initial on a piece of paper handed to me to read, but I disclaim any interest in the piece of paper handed to me. I put G. F. C. on it.

Q. That is a piece of paper I asked you about, which I said purported to be the original certificate?

A. Yes, sir.

(The instrument here follows.)

See Exhibit "A" to Original Bill of Complaint in this cause which will be found on Page 9 of this Record.

82 Q. When you say you disclaim any interest in it, do you speak for yourself, client, or both?

A. I have no interest in this piece of paper either for myself or for my client.

By the Court: As I understand it, the instrument is made by the defendants an exhibit to your testimony.

A. As a part of the proof?

By the Court: Whatever it is.

Mr. Fitzgerald: If the paper here introduced by counsel is offered as a part of the proof or evidence, we object to it; first because there is no evidence at all that it is anything but a copy, or purports to be a certificate or copy of certificate of the Louisville, New Orleans & Texas Railway Company, issued to the City of Clarksdale for two hundred and fifty shares of one hundred dollars each of stock; because, there is no evidence as to who wrote the words "Converted October 4, 1904; because, there is no evidence whatever to prove who wrote the words on the back of the certificate because there is nobody introduced here at all to prove that this is the original certificate or that it has any claim of title introduced by the defendant, because it has no standing as any proof in this cause, and because if introduced it would be immaterial and irrelevant in the matter in the case, as it does not constitute muniment of title or an indicia of ownership of any of the defendants herein to any of the stock, and in my opinion is incompetent, immaterial and irrelevant to the whole case, unless introduced by them as a part of indicia of ownership of stock, which should be proved as to how it came into their hands, where they got it, or what it is; because further that the indorsement on the back of it does not bear the seal of the United States Court which the Marshal of the United States Court is under the law required to keep and affix with his signature, and we object to the instrument in every re-

83 spect as before stated and also to any set of indicia of ownership by any of the defense to any property of the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company.

Judge Minor: Inasmuch as this paper has been made an exhibit to he testimony of Mr. Fitzgerald, I ask that the official stenographer nark it exhibit A to the testimony of Mr. Fitzgerald.

Mr. Fitzgerald: I desire further to add, and want the court's atten-ion called to the fact that it has never been proven that A. J. Cooke vas United States Marshal, that any judgment was ever rendered in ny court, that any execution was ever issued, that any venditioni xponas was ever issued, or that this writing on the back of this iece of paper was authorized in any way by any order of the court, nd that the instrument itself constitutes nothing except a piece of aper, which has not been identified by any person and is of no value s proof in this case.

Judge Minor: In response to the objections we call the attention f the court to the fact that this bears all the indicia of genuiness, nd not only that, but is identical, with the exception of one or two nmaterial features, with exhibit A to the original bill, which that ill avers is a true copy of the original certificate. The endorse-ient on the back purports to be written and signed by the United tates Marshal for the Northern District of Mississippi, and in the l:ence of any showing to the contrary, should be treated by the court s the original certificate of stock.

By the Court: If the objection in controversy here before the ourt is whether or not this is the original certificate of stock, No. 47, there has been only one witness on the stand in regard to the lentification of it, which is Mr. Fitzgerald, and he disclaims any nowledge of it personally as to its genuineness, and therefore I do ot see how the court can declare it to be the original certificate of ock upon his testimony alone. The certificate has every mark of being the original, from a physical inspection of the piece of paper itself. That it is the only thing the court can say. I think the only way to prove that this is the original is by meone who knows.

Judge Minor: It is agreed by counsel in order to preserve this aper from danger of loss that a copy of it may be put in the file nd the original may be put in any bank agreed upon by Mr. Scott nd Mr. Fitzgerald.

Complainant rests.

Mr. Scott: The defendant now renews the motion heretofore made bjecting to all of the evidence offered by complainant and moving gain to exclude all of the evidence for the following reasons: First, ecause the evidence introduced is incompetent, immaterial and relevant, because it is insufficient in law to justify the court in grant-ng the complainant any relief under the facts as alleged in the plead-ngs and third, because the evidence does not prove or tend to prove e issues made by the parties under the pleadings as framed.

By the Court: The court, without expressing any opinion as to hether or not the complainant has introduced sufficient proof to ntitle it to a decree as prayed for in this cause, but in order to expe-ite time, is of the opinion that it is better to have both the com-

plainant and defendant rest their cause before making any ruling on the merits, and for this reason the motion will be overruled.

(Counsel for defendant excepts.)

Mr. Fitzgerald: We introduce further, as part of the original proof, a certificate of J. J. Vance, chief office deputy and the custodian of the United States Marshal's record for the Northern District of Mississippi, which we ask the stenographer to mark introduced and I will read it to the court.

(Mr. Fitzgerald reads to the Court. Instrument marked exhibit B.)

85 I, J. J. Vance, Chief Office Deputy United States Marshal of the Northern District of Mississippi, hereby certify that I have carefully examined the entries of process in the United States Marshal's Civil Docket, during the period commencing August 12th, 1897, up to January 1st, 1904, and failed to find any record entry of a writ of venditioni exponas issued December 3rd, 1897, in the case of Pacific Improvement Company vs. The Town, or City of Clarksdale, Mississippi No. 3900 on the Docket of the Circuit Court of the United States for the Western Division of the Northern District of Mississippi.

This the 11th day of April, 1918.

J. J. VANCE,
Chief Office Deputy U. S. Marshal.

On the foregoing statement is the following endorsement: "Exhibit B of Mr. Fitzgerald's testimony. L. L. Goings, Steno."

86 Judge Minor: The defendants agree that that paper may be treated as deposition form taken from Mr. Vance, but object to its introduction as evidence on the ground that it is incompetent irrelevant and immaterial and that the marshal's office would not be the custodian of a vendi., but that the clerk's office is the custodian of such papers.

If the Court please, counsel for complainant and defendant have agreed that with reference to all papers in the case of Pacific Improvement Company against the City of Clarksdale Mississippi, same being No. 3900 on the docket of the United States Circuit Court for the Northern District of Mississippi, sitting at Oxford, either side may read from the original papers such parts as they choose, and that may be done in lieu of a certified copy of such papers and be taken as if the paper was properly proved, subject of course to the objections of incompetency, irrelevancy or immateriality. It is further agreed that instead of putting in the record the original papers in said case, either side may produce uncertified copies thereof, that is our agreement. Mr. Fitzgerald, is it not?

Mr. Fitzgerald: Yes sir.

Judge Minor: If the Court please, we now desire to offer the declaration of the plaintiff in the said suit of Pacific Improvement Company against the City of Clarksdale, No. 3900, in the United States District — of the Western Division of the Northern District of Missi

sippi, at Oxford, which case we will hereafter refer to in the course of this case as the suit of the Pacific Improvement Company vs. Clarksdale.

Defendant here reads said declaration as follows:

(Interrupted by objection from complainant.)

Mr. Fitzgerald: We object, as being incompetent, immaterial and irrelevant.

(Court reserves ruling until later on.)

(The above exhibit is in words and figures following, to wit:

87 In the Circuit Court of the United States for the Western Division of the Northern District of Mississippi, at Oxford.

THE PACIFIC IMPROVEMENT COMPANY, a Corporation Organized and Existing under the Laws of the State of California and a Citizen of that State, Plaintiff,

vs.

THE CITY OF CLARKSDALE, a Municipal Corporation Organized under the Laws of the State of Mississippi, Situate in Coahoma County, in said Division, and now Called the Town of Clarksdale, and a Citizen of Mississippi, Defendant.

The plaintiff sues the defendant for five thousand dollars which it says is due it from the defendant upon forty (43) three coupons issued by the defendant on or about the 15th day of January 1891 each for the sum of $60.00, and which are here to the Court shown Thirteen (13) of said coupons were due and payable on the 15th of January 1892, fifteen (15) thereof were due and payable on the 15th of January 1893 and fifteen (15) others were due and payable on the 15th day of January 1894. Such coupons were so issued by the defendant for the interest to become due on certain fifteen (part of an issue of twenty five bonds of one thousand dollars each) bonds of $1,000.00 each issued by the defendant under the authority of an act to authorize Counties, Cities and towns to subscribe to the Capital Stock of railroads approved March 7th, A. D. 1882. The plaintiff purchased the said fifteen bonds, numbers 11 to 25 inclusive, with all coupons issued therewith for value on the — day of — 1891, and was and is the holder of the said thirty seven (37) coupons for value in due course in trade. A copy of one of the bonds and of said coupons is filed herewith as a part and parcel of this declaration, and the said forty three coupons are here to the
88 Court shown. The plaintiff sues the defendant for the sum of sixty dollars on each of said thirty seven coupons together with interest on each from its maturity amounting to $5,000.00 as aforesaid.

(Signed) D. A. SCOTT,
HOLMES CUMMINS,
Attorneys for Plaintiff.

(On back:) 3900. The Pacific Improvement Company v. The City (or town) of Clarksdale, Mississippi. Declaration. Filed August 4th, 1894, & Summons issued. G. R. Hill Clerk. Recorded F. R. Common Law No. 1, pages 321-323. Holmes Cummins, Plff.'s Atty.

Endorsed on the back is: "Exhibit "A" (of Defendant's testimony). L. L. Goings, stenographer."

89 Judge Minor: It is agreed by counsel for the complainant and defendants that there was a valid judgment rendered on or about June —, 1897, in favor of the Pacific Improvement Company and against the city or town of Clarksdale by the United States Circuit Court for the Western Division of the Northern District of Mississippi, sitting at Oxford, for the sum of $3,058.13, said judgment being rendered in the case of Pacific Improvement Company against the city or town of Clarksdale, No. 3900 in said United States Circuit Court and said judgment is as follows:

(This day comes the parties by their attorneys and thereupon came a jury of good and lawful men; towit, L. Jarvis and eleven others who being duly elected, empaneled, sworn and charged well and truly to try the issue joined between the parties, upon their oath do say "that the jury find for the plaintiff, the Pacific Improvement Company and assess its damages at three thousand fifty eight dollars and thirteen cents ($3,058.13). It is therefore considered by the court that said plaintiff recover of said defendant, the City (or town) of Clarksdale, Mississippi, the sum of $3,058.13 by the jury aforesaid assessed, together with the costs herein expended, for which let execution issue.)

Defendants now offer in evidence the execution issued in said case of the Pacific Improvement Company against Clarksdale, together with the return of the marshal thereon and all indorsements, said execution of fi. fa. being as follows: (Defendant's counsel here read the original fi. fa. and marks No. 2, H. D. M.)

The said exhibit H. D. M. No. 2, is in words and figures following, to wit:

90 "Exhibit H. D. M. No. 2."

The President of the United States to the marshal of the Northern District of Mississippi, Greeting:

We command you that of the good- and chattels, lands and tenements of defendant The City (or Town) of Clarksdale, Mississippi late of your district, you cause to be made the sum of Three Thousand and Fifty Eight Dollars and 13 Cents, which the Pacific Improvement Company lately in the Circuit Court of the United States for the Western Division of the Northern Judicial District of Mississippi, has recovered against it for its damages which it sustained by reason of the non-performance of a certain promise and assumption by said defendant to the said plaintiff made, with interest on the said sum, at 6 per cent per annum, from the 2nd day of June

1896 until paid; also the sum of Four Hundred and Eighty Eight Dollars and 24 cents, for its costs by it about its suit, in that behalf expended, whereof the said defendant is convicted as appears to us of record. And that you have the said moneys before this Judge of the Circuit Court of the United States, for the Western Division of the Northern District of Mississippi, at Oxford, on the First Monday in December next, to render to the said plaintiff for its damages and costs aforesaid, and have then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the First Monday of June A. D. 1897 and 120 year of the Independence of the United States.

Issued the 12th day of August A. D. 1897.

[SEAL.] (Signed) G. R. HILL, *Clerk.*

91 *Bill of Costs.*

	Dollars.	Cents.
Issuing Process, Certificates and Seal	3	00
Entering return, Filing and Cert.	..	..
Entering Appearance	..	..
Filing Plea, Cert. and Seal	..	25
Filing Papers, Cert. and Seal	2	25
Orders and Rules	..	60
Motions	..	30
Entering Judgment	..	30
Swearing witnesses to testify	..	50
Swearing witnesses to attendance	..	..
Certificate to witness	2	25
Continuance	..	..
Affidavit	..	..
Issuing Subpœna, Cert. and Seal	..	..
Entering Return, Fil. and Cert.	..	..
Dockets and Indexes	..	..
Issuing Execution, Cert. and Seal	1	70
Entering Return, Fil. and Cert. & Duplicate	1	70
Issuing Commission, Cert. and Seal	..	..
Issuing Interrogatories	..	..
Notice	..	..
Entering Dismission	..	..
Copies	..	..
Entering Verdict	..	..
Decrees	..	..
Issuing Al. Writ., Cert. and Seal	..	..
Entering Return, Fil. and Cert	..	..
Issuing Scire Facias, Cert. and Seal	..	..
Entering Return, Fil. and Cert	..	..
Final Record	13	55
Certificate	..	..
92 Making record for court of appeals	40	00
	66	40

	Dollars.	Cents.
Credit by cash for record of Deft	40	00
Bal. Clerk's Cost	26	40
Answer of Guardian ad Litem	..	..
Stating account and *D*eport of Master	..	..
Cons. on sale	..	..
Making Deed and Acknowledgement	..	..
Report of Sale	..	..
Traveling Expenses	..	..
Cost taxed on 1st Appeal	236	44
Cost in Court of Appeals on 1st Appeal	101	80
Cost in Court of Appeals on 2nd Appeal	49	40
Attorney's Tax Fee	..	..
Deposition Fees	..	..
Witness Fees	71	60
Marshal's Fees	3	00
	$488	24

93 Executed the within writ this the 13" day of Aug. 1897 by levying on and taking into my possession one Certificate of stock, the property of said defendant in the Louisville, New Orleans and Texas R. R. Number 147—for 250 shares, issued to the town or city of Clarksdale, Miss. Further executed on this the 6th day of Dec. 1897 at 12 o'clock meridian by selling said certificate of Stock No. 147 after due advertisement by posting notices in three public places for the period of 10 days as provided by law, to the highest & best bidder for cash, before the Western door of the United States Court House, and post office building in the town of Oxford, Miss., at which sale the Pacific Improvement Co. became the highest and best bidder, at and for the price of $100.00 and at the same time & place I executed the writ of vende exponas issued to me in this cause and offered for sale all the interest which the City or Town of Clarksdale (Continuation of Marshal's return) had in the Capital Stock of the Louisville, New Orleans & Texas Railway Co. or in the Yazoo & Mississippi Valley Railroad Company, offering said interest at the same time with said certificate of stock to the said Pacific Improvement — for the said sum of $100.00, that being the highest & best bid offered for same.

Dec. 6th, 1897.

(Signed) A. J. COOKE,
U. S. Marshal.

94 (On Back.))

No. 1.

No. 3900.

To December Term, 1897.

PACIFIC IMPROVEMENT COMPANY

v.

THE CITY (OR TOWN) OF CLARKSDALE, MISSISSIPPI.

Fi. Fa.

June 25, 1896.

Judgement	$3058.13
Clerk	26.40
Cost in 1st Appeal	236.44
Cost in Court of Appeals 1st. App.	101.80
Attorney	
Attorney Court of Appeals 2 Ap.	49.40
Marshal	3.00
Witness	71.60

Int. 6 per cent.

W. A. PERCEY,
Attorney.

Mandate Docket No. 38. Ent. P. 10, C. D.

95 Mr. Fitzgerald: The complainant makes the following objections: First, that the return on the said execution does not show a proper levy; second, that the return on its face shows that the property levied on was sold at the wrong time and the wrong place and in an improper manner; third, that the return attempts to show the execution of a writ of venditioni exponas on which paper alone the return could be made, and because the return is truly and absolutely void, as to the actual sale and delivery of any of the share interest of stock of the City of Clarksdale in and to the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company because the return is not in conformity with the statute of the State of Mississippi in regard to the levy and sale of such property in any respect, because the return does not show any authority by law to make such a levy as is alleged to have been made or to make such a sale as is attempted to be shown by the return.

Court reserves ruling.

Judge Minor: Counsel for defendant now offers in evidence the original paper from the file in the said case of Pacific Improvement Company against Clarksdale, which is marked on its back "Duplicate fi. fa." and reads as follows, including the return.

(Counsel here reads the instrument and marks No. 3 H. D. M.)
The said exhibit H. D. M. No. 3, is in words and figures following, reads the instrument and marks No. 3 H. D. M.
to wit:

96 "H. D. M. No. 6."

The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

We command you that of the goods, chattels, lands and tenements of defendant The City (or Town) of Clarksdale, Mississippi, late of your District, you cause to be made the sum of Three thousand and fifty eight dollars and 13 cents, which the Pacific Improvement Company lately, in the Circuit Court of the United States for the Western Division of the Northern Judicial District of Mississippi, has recovered against it for its damages which it sustained by reason of the non-performance of a certain promise and assumption by said defendant to the said plaintiff made, with interest on the said sum, at 6 per cent per annum, from the 2nd day of June, 1896 until paid; also the sum of Four hundred and eighty eight Dollars and 24 cents, for its costs by it about its suit, in that behalf expended, whereof the said defendant is convicted as appears to us of record, and that you have the said moneys before the Judge of the Circuit Court of the United States, for the Western Division of the Northern District of Mississippi, at Oxford, on the First Monday in December next, to render to the said plaintiff for its damages and costs aforesaid, and have then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the First Monday of June A. D. 1897 and 120 year of the Independence of the United States.
Issued the 12th day of August A. D. 1897.
[SEAL.] (Signed) G. R. HILL, *Clerk.*

97 *Bill of Costs.*

	Dollars.	Cents.
Issuing Process, Certificate and Seals	3	00
Entering Return, Filing and Cert.	..	..
Entering Appearance	..	..
Filing Plea Cert. and Seal	..	25
Filing Papers Cert. and Seal	2	25
Orders and Rules	..	60
Motions	..	30
Entering Judgment	..	30
Swearing witnesses to testify	..	50
S-earing witnesses to attendance	..	..
Certificate to witness	2	25
Continuance	..	..
Affidavit	..	..

	Dollars.	Cents.
Issuing subpœna Cert. and Seal	..	..
Entering Return Fil. and Cert.	..	..
Dockets and Indexes	..	..
Issuing execution Cert. and Seal	1	70
Entering Return Fil. Cert. and duplicate	1	70
Issuing Commissions Cert. and Seal	..	..
Issuing Interrogatory	..	..
Notice	..	..
Entering Dismission	..	..
Copies	..	..
Entering Verdict	..	..
Decree	..	..
Issuing Al., Writ. Cert. and Seal	..	..
Entering Return, Fil. and Cert.	..	..
Issuing scire facias, Cert. and Seal	..	..
Entering Return Fil. and Cert.	..	..
Final Record	13	55
Certificate	..	..
98 Making Record for Court of Appeals	40	00
	66	40
Credit by cash paid for record by Deft.	40	00
Bal. Clerk's Cost	26	40
Answer of Guardian ad litum	..	..
Stating account and report of Master	..	..
Coms. on Sale	..	..
Making deed and acknowledgment	..	..
Report of sale	..	..
Traveling expenses	..	..
Cost taxed on 1st Appeal	$236	44
Cost in Court of Appeals on 1st Appeal	101	80
Cost in Court of Appeals on 2nd Appeal	49	40
Attorney's tax fee	..	..
Deposition fee	..	..
Witness fees	71	60
Marshal's fees	3	00
	$488	24

99 (*Return on Duplicate Fi. Fa.*)

Received at Jackson, August 13, 1897 and executed same day by going to the office of the Yazoo & Mississippi Valley Railroad Company in Jackson and there declaring that I attached as levied upon the stock, shares and interests of defendant therein; further by delivering to George Gordin, Agent of the said Yazoo & Mississippi Valley Railroad Company, a true copy of this writ, and demanding of him, by instrument of writing delivered to him, a statement in

writing under oath of the amount of the defendant's stock, the number of its shares, and extent of its interest in said railroad company.

J. S. McNEILY,
U. S. Marshal,
By J. K. McNEELY, *Deputy.*

100 (On Back.)

No. 1.

No. 3900.

To December Term, 1897.

PACIFIC IMPROVEMENT COMPANY

v.

THE CITY (or TOWN) OF CLARKSDALE, MISSISSIPPI.

Duplicate Fi. Fa.

June 25, 1896.

Judgment	$3058.13
Clerk	26.40
Cost in 1st Appeal	236.44
Cost in Court of Appeals 1st Appeal	101.80
Attorney	....
Attorney Court of Appeals 2nd Appeal	49.40
Marshal	3.00
Witness	71.60

Int. 6 per cent.

W. A. PERCY, *Attorney.*

Mandate Docket No. 38. Ent. P. 10, C. D.

Endorsed on the face:

"Filed December 14, 1897.
G. R. HILL, *Clerk.*"

101 Mr. Fitzgerald: To which the complainant makes the following objections; to wit, because the paper is incompetent, immaterial and irrelevant, because the return does not show any sale, because the return is made *of* proposed to be made by a deputy United States Marshal of the Southern District of Mississippi and no sale is alleged to have been made by him, because no levy is shown by the execution as required by the statute of Mississippi or the law in force at that time as acknowledged and acted upon by the United States Court- in the districts of Mississippi, because the return is void except as a return*ed* nulla bona and shows on its face that no action was taken by the officer.

Judge Minor: Defendant's counsel now reads from the original record of said Pacific Improvement Company against Clarksdale the paper endorsed "alias fi. fa." as follows:

(Reads to Court and marks No. 4 H. D. M.):

If the Court please, I withdraw all I have just said about introducing the paper marked "alias fi. fa." as I don't offer that in evidence and ask the Court to withdraw what I have said in that respect.

Defendant's counsel next read from the record in said Pacific Improvement Company against Clarksdale the certificate of L. E. Oldham, clerk of the District Court of the United States for the Western Division of the Northern District of Mississippi as follows, said paper being signed L. E. Oldham, Clerk, by H. A. Moore, Chief Deputy Clerk, and bearing the seal of the clerk's office. Counsel read said certificate as follows and marked No. 4 H. D. M.

The said exhibit H. D. M. No. 4 is in words and figures, following, to wit:

102 "H. D. M. No. 4."

In the District Court of the United States for the Western Division of the Northern District of Mississippi.

No. 3900.

THE PACIFIC IMPROVEMENT COMPANY

vs.

THE CITY (OR TOWN) OF CLARKSDALE, MISSISSIPPI.

Certificate of Clerk.

I, L. E. Oldham, Clerk of the District Court of the United States for the Northern District of Mississippi, do hereby certify that the following entries appear on the docket of this Court, in the above styled cause:

Aug. 12, 1897.	Issuing execution	$1.70
Aug. 12, 1897.	Issuing duplicate execution to Southern District	1.70
Nov. 27, 1897.	Issuing Vendi.	....
Dec. 9, 1897.	By cash paid in by the Marshal on execution	93.82

Given under my hand and the Seal of said Court at Oxford, this the 9th day of April, 1918.

[SEAL.]

L. E. OLDHAM, *Clerk,*
By H. A. MOORE,
Chief Deputy Clerk.

103 Mr. Fitzgerald: We object as incompetent, immaterial and irrelevant.

Judge Minor, Counsel for defendant, then read in evidence a paper from the record in said Pacific Improvement — vs. Clarksdale, entitled "Answer of Y. & M. V. Railroad Co." and marked by the clerk "Filed October 23, 1897." (Counsel read and marked 5 H. D. M.)

"H. D. —. No. 5."

UNITED STATES OF AMERICA,
Northern District of Mississippi, Western Division:

THE PACIFIC IMPROVEMENT COMPANY

vs.

THE CITY OF CLARKSDALE.

Come the Yazoo & Mississippi Valley Railroad Company, said company being pretended to have been served in said cause with a notice and demand under Section 3467 of the annotated Code of 1892, and, protesting that said pretended service of notice and demand is null and void for want of conformity to the said statute, in that the same were not given and made at the office or principal place of business of said Company within the meaning of said statute, and not hereby waiving or releasing any of the rights and defences against such pretended notice & demand—said Company answers as follows:

First: That at the time of said service, as so pretended to be made, the said City of Clarksdale had no stock in the said Yazoo & Mississippi Valley Railroad Company, nor any interest in the same except as hereinafter set forth; nor has said city any stock or interest in the same now, except as hereinafter set forth.

Second: That said Company was incorporated by *any* Act of the Legislature of the State of Mississippi at its session of 1882, and organized thereunder. In the year 1884 the Louisville, New Orleans and Texas Railway Company was organized under certain acts of said legislature with a capital stock of five millions of dollars, which said capital stock was all issued shortly thereafter to the Financial Improvement Company in part payment for the construction and equipment by said last named company of the railroad of said L. N. O. & T. Railway Company; said Improvement Company being a business corporation or association composed of this, the Pacific Im-

103*a* ment Company, and a certain firm of R. T. Wilson & Company, which two constituents held stock of, or interest in, the said Financial Improvement Company, in the proportions respectively, of sixty and forty parts in one hundred. In the year 1892 the said Louisville, New Orleans & Texas Railway Company was consolidated with and merged into, this respondent, and by their act of consolidation it was provided, amon-st other things, that the original capital stock of said two *sontituent* companies should be for the present kept separate and distinct, but that in the stock h-lders meetings of the consolidated company the holders of L. N. O. & T. Rail-

way stock should vote and have the privileges, in proportion to amount, as if such stock had been converted into consolidated Yazoo & Mississippi Valley Railroad stock; and such is the general attitude of holders of such stock at this time. Whether the said City of Clarksdale now holds or owns or is in any way entitled to any stock of or in the said L. N. O. & T. Ry. Co., or was at the time of the pretended service of said notice and demand, this respondent does not know and cannot state.

The said Financial Improvement Company not only received from the said L. N. O. & T. Ry. Co. the stock as aforesaid for the construction and equipment of said railway, but also it received all of the bonds of said railway company on the same consolidation. Early in the year 1892, and before the consolidation aforesaid, the said Financial Improvement Company, or the constituents thereof, the said Pacific Improvement Company and R. T. Wilson & Co. sold and delivered to the Mississippi Valley Company, a Mississippi promoting corporation, all of the said stock of L. N. O. & T. Ry. Co. and bonds then held by them or any of them, as respondent believes constituting a large majority of both such stock and bonds, but not all of either of them, certain of each having been previously disposed of to third parties; but said Financial Improvement Company while it thereby terminated its business connection with the said L. N. O. & T. Ry. Company, and its practical control of the same, did not deliver to its vendees, or to any one, the stock books of said Railway Company, but now has the same in its possession. Wherefore respondent
063b says that such stock books are not in its possession, and never have been in its possession; and it does not know what said books do or do not show in respect to the issuance of L. N. O. & T. stock to said City of Clarksdale, nor does it know whether such stock was ever issued to and received by said City, or whether if so issued and received, it has ever been issued, or transferred, at the request of said City, or by the same, to any third party.

Thirdly: None of the books of this respondent show any such stocks of the L. N. O. & T. Ry. Co. to be held by said City, or show any transfer of such stock, if any was so issued and accepted, to any assignee of said City; nor does respondent know of any such holding or transfer, nor has it been notified of any such transfer, except that it was informed by letter of Mr. W. A. Percy, that a levy had been made, under a fi. fa. herein issued, on a certain certificate for 250 shares, as more fully shown by the record herein and a sale of the same therein by the Marshal of this court, and a purchase thereunder of said shares by the said Pacific Improvement Company. And now, having fully answered, this respondent, still protesting and insisting as above, prays to be dismissed &c.

YAZOO & MISSISSIPPI VALLEY R. R. CO.,
By MAYES & HARRIS, *Attys.*

J. C. WELLING.

Sworn to this the 12th day of October, 1897, and subscribed before me by J. C. Welling, Vice-President.

[SEAL.] JULIUS L. RINNE,
Notary Public, Cook County, Illinois.

Endorsed on the back is the following: 3900. Pacific Improvement Co. vs. City (or Town) of Clarksdale. Answer of Y. & M. V. R. R. Co. "Filed October 23rd, 1897. G. R. Hill, Clerk."

104 Judge Minor: The defendants in offering this paper of course object- to the consideration as evidence of a statement made in the answer as to what information the Yazoo and Mississippi Valley Railroad had from Mr. Percy about a levy. If the court please, I believe on consideration I will withdraw the answer of the Y. & M. V. which I have just read, marked "H. D. M. No. 5."

We now desire to introduce the following paper, which I have marked H. D. M. No. 6, which reads as follows:

(Counsel reads to the Court paper marked H. D. M. No. 6.)

Mr. Fitzgerald: We object, as it is incompetent, immaterial and irrelevant.

Judge Minor: Defendant now offers in evidence a certified copy of the proceedings of meetings of the Board of Mayor and Aldermen of Town of Clarksdale, which meeting was held on July 11, 1898 *on July 11, 1898* and January 14, 1899 (two the same day) being the paper which was identified by Mr. Stratton and reads paper as follows:

(Counsel here reads and marks H. D. M. No. 7.)

The said exhibits H. D. M. No. 6 and H. D. M. No. 7, are respectively in words and figures following, to-wit:

105 "H. D. M. No. 6."

Bill of Sale.

219.

H. K. Brewer & Co., Successors to H. Anstice and Co., Stationers 31 and 33 Nassau Street, New York.

Know all men by these present-

That the Pacific Improvement Company, 71 Broadway, N. Y., of the first part, for and in consideration of the sum of Twenty-seven hundred seventy-seven and 50/100 Dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, by the Mississippi Valley Company of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents do grant and convey, unto the said party of the second part, its executors, administrators and as

signs Two hundred and fifty (250) Shares of the Capital Stock of the Louisville, New Orleans and Texas Railway Company, represented by certificate No. 147 in the name of the City of Clarksdale, Miss.

To have and to hold the same unto the said party of the second part, its executors, administrators and assigns forever. And it does for its heirs, executors and administrators, covenant and agree to and with the said party of the second part, to warrant and defend the sale of the said Louisville, New Orleans & Texas Railway Company stock hereby sold unto the said party of the second part, its executors, administrators and assigns against all and every person and persons whosoever.

In witness whereof, we have hereunto set our hand and seal the 4th day of October in the year one thousand nine hundred and four.

Signed, sealed and delivered in the presence of

PACIFIC IMPROVEMENT COMPANY,
By THOM. H. HUBBARD, *President.*

Attest:
[SEAL.] L. A. VAN DERVEER,
Asst. Secretary.

106 STATE OF NEW YORK,
City and County of New York, ss:

On this fourth day of October in the year of our Lord one thousand nine hundred and four, before me the undersigned personally came and appeared Thom. H. Hubbard, the President of the Pacific Improvement Company, to me personally known, and known to be the president of said Company, and who executed the foregoing instrument, and he acknowledged to me that he executed the same, as the act and deed of said Pacific Improvement Company for the purpose and consideration therein expressed.

WILLIAM SHILLABOR,
Notary Public, New York County.

Endorsed on the back of the foregoing instrument is the filing thereof. "Pacific Improvement Company to Mississippi Valley Company. Bill of Sale. Dated Oct. 4, 1904.

107 "EXHIBIT No. 7 H. D. M."

Reorganization of the Town of Clarksdale, Mississippi.

Be it remembered that, the Board of Mayor and Aldermen of the Town of Clarksdale, Mississippi, met at the office of the Mayor on July 11th, 1898, for the purpose of reorganizing, with the following officers, who had been appointed by the Governor of the State.

Walter Clark, Mayor, J. R. Bacot, J. A. Dola, Guy P. Clark, W. D.

Cutrer, Al Nachman, Aldermen, W. H. McCoy, Marshal and T. F
Ward, Treasurer.

Chancery Clerk, M. J. Bouldin, administered the oath of offic
to the newly appointed officers, and then the Board proceeded t
business, by electing J. J. Price, Clerk of the Board, and the follow
ing officers were elected: W. D. Cutrer, Mayor Pro tem., I. W
Cutrer, City Attorney, Dr. H. C. Buck, City Health Officer.

The bond of Mayor Clark for Two thousand dollars, with Walte
Clark, C. W. Clark, and J. W. Cutrer, as sureties was accepted, an
also the bonds of McCroy for four thousand dollars as City Marsha
and *wto* thousand dollars as City Tax Collector, with W. H. McCro
C. W. McCroy, J. W. Cutrer, H. H. Hopson, J. L. Shannon an
O. M. Ellis as sureties *was* also accepted.

W. D. Cutrer and J. R. Bacot were appointed a committee
check up the old books of former Mayor Clark and the books
F. L. Smith, Secretary of the Board of City Governors.

There being no further business, a motion to adjourn prevaile

J. J. PRICE, *Clerk.*
WALTER CLARK, *Mayor.*

108 Be it remembered, that the Board of Mayor and Alderme
of the Town of Clarksdale, met in special session, at the offi
of the Mayor, on Monday Evening July 11th, in pursuance to t
following call:

To J. R. Bacot, G. P. Clark, W. D. Cutrer, J. A. Dolan, and Al Nac
man, Aldermen:

You are hereby notified that there will be a special meeting of t
Board of Mayor and Aldermen of the Toen of Clarksdale this 11
day of July, 1898, at 8 o'clock p. m. for the purpose of providi
for the payment of the Town's debt, and for the election of a C
Tax Assessor, and the making an assessment roll.

(Signed) WALTER CLARK, *Mayor.*

Executed by personal *a*ervice on the above Aldermen, this Ju
11th 11 o'clock a. m. except Al Nachman.

(Signed) W. H. McCROY, *Marshal.*

George Alcorn was elected City Tax Assessor at a salary of Twe
Five Dollars and instructed to make a thorough assessment of
real and personal property, within the corporate limits. The C
Attorney prepared the following, recognizing the City's indebtedn
of Twenty Five Thousand Dollars, as follows:

Whereas, the indebtedness claimed a*hainst* the Town of Clar
dale, on account of an issue of Twenty Five Thousand Dollars
Six Per Cent Bonds, dated Jan. 15th, 1891, to the L. N. O. &
Rail Company, and interest accrued thereon, which said in*teb*-edn
was held forty per cent by R. T. Wilson and Co., and sixty per c
by Pacific Improvement Company, has been compromised by
payment of Twenty Five Thousand Dollars, under the terms o

compromise settlement made with said parties by E. L. Anderson, W. P. Holland and J. W. Cutrer, a committee appointed by the citizens and tax payers of this Town, for that purpose, a copy of the papers evidencing which settlement has been filed with the Clerk of this Board, and whereas, this Board ratifies said settlement and now desires to carry out the terms of said settlement, as stated,
109 and provides funds for the payment of said debt, by the issuance of a new series of twenty five thousand dollars of the bonds of this town, it is therefore — and ordained that a committee composed of Aldermen Bacot and Dolan be and it is hereby appointed to negotiate the sale of twenty five thousand dollars of bonds of this town, under the provisions of Section 3014 of the Annotated Code of 1892, upon the best terms obtainable, subject to the approval of this Board, and to report their action to this Board at the earliest practicable day.

There being no further business a motion to adjourn prevailed.

J. J. PRICE, *Clerk.*
WALTER CLARK, *Mayor.*

110 Jan. 14, 1899.

Be it remembered that the Board of Mayor and Aldermen met in a special session this the 14th day of January, 1899, at the Mayor's office in Clarksdale, Miss., pursuant to the following call:

To W. H. McCroy, Marshal:

You are hereby directed to summon the following named Aldermen, J. A. Dolan, J. A. Bacot, W. D. Cutrer, Paul Clark and Al Nachman to attend a special meeting of the Board of Mayor and Aldermen to be held at 12 o'clock noon for the purpose of providing for the payment of R. R. bonds interest due January 15th, of passing on application for building permits and of allowing sundry accounts duly filed.

8.30 A. M.

(Signed) W. CLARK, *Mayor.*

Endorsed.

Executed by personal service on J. A. Dolan, J. R. Bacot, W. D. Cutrer, Paul Clark and Al Nachman, this January 14th, 1899 at 8.45 A. M.

(Signed) W. H. McCROY, *Marshal.*

Present and presiding, W. Clark, Mayor, and J. A. Dolan, J. R. Bacot, W. D. Cutrer, Paul Clark and Al Nachman, when the following proceedings were had:

(Here follows order granting building permits.)

111 In the Matter of the Settlement of the Past-due Coupons upon Bonds Issued by the City of Clarksdale on January 15th, 1891, to the Louisville, New Orleans & Texas Railway Company.

No. 66.

The committee appointed by this Board at the meeting thereof held on July 11th to negotiate a sale or arrange for placing the old debt of the City of Clarksdale, due on twenty five bonds of $1,00-.00 each, issued to the Louisville, New Orleans and Texas Railway Company, have reported to this Board that, they have arranged to place the original bonds now held by the Planters Bank with the Planters Bank upon the following terms.

This is to say at the time the said Planters Bank paid out for the said bonds, to wit, on June 30th, 1898, twenty five thousand dollars there was accruing interest due thereon, and at the time said committee made said agreement with said Planters Bank, there was accrued interest on said bonds to the amount of Eight hundred sixteen dollars, and sixty cents, which said sum it was agreed was to be paid to the said Planters Bank at the maturity of the coupons attached to said bonds, to wit, January 15th, 1899, there was also due thirty seven dollars fifty cents as exchange in the payment in taking up the bonds, and One hundred dollars, expenses incurred in and about said transaction, amounting to the sum of Nine hundred and fifty four dollars and ten cents all told, and whereas, by said agreement, it was understood that said Planters Bank should retain sixteen of the said coupons, maturing on January 15th, 1899 aggregating the sum of $960.00, and should pay the treasurer of the Town of Clarksdale, the sum of $5.00 to cover the difference between the amount called for by said coupons and the amount due said Bank at the time of the settlement made by the committee aforesaid, and up to January 15th, 1899.

Now, therefore, it is ordered that upon the said Planters Bank surrendering to the Board of Aldermen twenty five coupons maturing January 15th, 1899, the Clerk is ordered to draw his war-

112 rant *rant* upon the treasurer for the sum of nine hundred and fifty four dollars and ten cents and the said Planters Bank having heretofore delivered to this Board of Aldermen all of said coupons maturing January the 15th, 1899, except sixteen and having now delivered to the Board the said sixteen coupons, it is ordered that the warrant aforesaid be directed to issue in favor of said Bank under the terms of settlement made for and in behalf of the Town of Clarksdale with the Pacific Improvement Company and R. T. Wilson & Company all passed due coupons maturing at any time prior to January 15th, 1899 having been agreed upon to be cancelled and satisfied and the Planters Bank now producing and delivering to the Board of Aldermen seventy nine of said past due coupons described as follows to wit:

Coupons on bonds No-. 1 to 10 inclusive, due January 15th, 1898, coupons on bonds No-. 11 to 16, inclusive, due January the 15th, of the years 1895, 1896, 1897, and 1898 and coupons from bonds No-. 17 to 25 maturing January 15th, 1895, 1896, 1897, 1898 and 1899, aggregating seventy *none* coupons the said coupons are all ordered cancelled and destroyed.

As to the remainder of the said coupons past due the said Planters Bank now delivers to the said Board of Aldermen and agreement and contract with the said Pacific Improvement Company and R. T. Wilson & Company by which all past due coupons upon the bonds aforesaid were transferred and delivered to the said Planters Bank and the Board of Aldermen accept said obligation as to the transfer and in satisfaction of said coupons, and discharges said Planters Bank from any further liability with regard to the same, it being understood, however, that the said Planters Bank as the assignee of all said coupons, and the judgment rendered thereon shall deliver to the Board of Aldermen an authority to the Clerk of the Circuit Court of the United States for the Western Division of the Northern District at Oxford, to satisfy any and all judgments rendered upon any of said coupons and to dismiss any and all suits pending upon the same. Any costs however, attending the said suits to be borne
113 by the said town of Clarksdale so far as said costs have not heretofore been paid and so far as the said Planters Bank is concerned but the costs attending the dismissal of any suits pending under the agreement hereinbefore referred to is to be borne by the plaintiff therein, the Pacific Improvement Company or R. T. Wilson & Company the said contract and agreement is made a part of this order, and the same is copied herein at length, the same being — the words and figures following, to wit:

In consideration of the payment to us the Pacific Improvement Company and R. T. Wilson & Company by the Planters Bank of Clarksdale, Miss., of the sum of twenty five thousand dollars ($25,-000.00) cash in hand on this day, we, the said Pacific Improvement Company and R. T. Wilson & Company hereby transfer, set over and assign to the Planters Bank the full issue of twenty five thousand dollars ($25,000.00), of bonds issued by the City of Clarksdale, to the Louisville, New Orleans & Texas Railway Company and payable to the said company or bearer said bonds being six per cent bonds, together with all unpaid, past due coupons, originally attached to said bonds and all maturing coupons attached thereto. This transfer includes the transfer and assignment of a certain judgment rendered in favor of the Pacific Improvement Company on certain of past due coupons against the said City of Clarksdale, rendered by the Circuit Court for the Western Division of the Northern District of the United States at Oxford, Mississippi and also pending suits upon any of said past due coupons in favor of either of us.

All costs which have been paid by us up to date we assume, all other costs to be assumed by the Planters Bank *ed*cept the costs in the suit of R. T. Wilson & Company vs. the City of Clarksdale, now pending which is to be dismissed at once at plaintiff's cost. In testi-

mony whereof we have hereunto set our hand in triplicate on
114 this the 30th day of June 1898.

PACIFIC IMPROVEMENT COMPANY,
By I. C. GATES, *Asst. Secy.*
R. T. WILSON & COMPANY,
By J. M. EDWARDS, *Attorney.*

I hereby certify that the foregoing is a true and correct copy of the said original agreement now in my possession.

AL NACHMAN, *Clerk.*

There being no further business before the Board a motion to adjourn prevailed.

WALTER CLARK, *Mayor.*

AL NACHMAN, *Clerk.*

115 STATE OF MISSISSIPPI,
Coahoma County:

I hereby certify that the foregoing and attached nine pages contain true, accurate and correct copies taken from as shown on Minute Books of the Town now City of Clarksdale, Coahoma County, Mississippi.

Witness my signature, as Clerk of said City of Clarksdale, last aforesaid and my official seal, this the twenty fifth day of May A. D. 1917.

[SEAL.]

R. E. STRATTON, JR.,
Clerk of City of Clarksdale, Miss.

116 Mr. Fitzgerald: To which instrument, certified copy, the complainant objects as being incompetent, immaterial and irrelevant to the cause at issue in this case.

Mr. D. A. SCOTT sworn as witness on behalf of defendant.

Direct examination.

By Judge Minor:

Q. Are you Mr. D. A. Scott of Clarksdale?
A. I am.
Q. What is your profession, Mr. Scott?
A. I am a lawyer.
Q. How long have you been a lawyer?
A. Forty odd years.
Q. In what County?
A. Coahoma County.
Q. Did you or not represent any of the parties to the litigation hereinbefore referred to as to the Pacific Improvement Company vs

The City of Clarksdale in the United States Distroct Court of Oxford, Miss.?

A. I did.

Q. You represented whom?

A. I represented dirrectly R. T. Wilson & Company. The suit that was first filed, however, was in favor of the Pacific Improvement Company and knowing that the same questions were involved in that suit which would affect my client, R. T. Wilson & Company, I also undertook to act the part in the transaction of that suit at the instance and request of Mr. Holmes, who represented the Pacific Improvement Company and I joined in with him at his request and at the request of R. T. Wilson & Company.

Q. Your name is signed to that declaration?

A. Yes sir. It is my individual signature; whether it — my stenographer or Mr. Cummins' under my authority, I don't
117 know.

Q. It has already been agreed, Mr. Scott, as you heard here that in that litigation a valid judgment was rendered against the City of Clarksdale in favor of the Pacific Improvement Company of $3058.13. Please state if you know what steps were taken to realize on that judgment.

Mr. Fitzgerald: We object to that question. What steps were actually taken can be shown by the records.

By the Court: Let him answer it. (Complainant's except.)

A. All that I know about that is the fact that one or more executions were issued on that judgment and I also know that at one time the Marshal came over here for the purpose of levying upon the certificate of stock, which the City then owned as a stock holder in the Louisville & New Orleans & Texas Railway Company. I was not present when the stock was levied upon and therefore cannot say anything further on the subject.

Q. What was the condition of the Town government of Clarksdale about the first of January 1898 and July 11th, 1898, at which latter date the council held a meeting the minutes of which I have read?

A. It was a very ch-otic unstaisfactory state.

Mr. Fitzgerald: We object, as the record itself of the City government is the only evidence.

By the Court: Let him answer.

Witness continues: As I have stated, the affairs herevin the City of Clarksdale were in a very chaotic and unsatosfactory condition. The judgment of the Pacific Improvement Company case had been rendered and both, all of the attorneys in the case were anxious to realize on it, and we so informed Mr. J. W. Cutrer, who represented the City in that case as its attorney, and thereupon some time in the early part of January, in order to avoid the service of process as we understood, all of the officers of the City, including the Mayor and all the Aldermen, and all of the other officers resigned
118 and there was formed what was then called a committee of tax payers who undertook to take charge of the municipal

affairs of the town or City of — and a bill was introduced in the Legislature in January 1898—the bill was introduced after the resignation of all the officers had been accepted, for the purpose of creating a taxing district of the City in lieu of municipality. This bill was before the committees and both Mr. W. A. Percy and I went to Jackson for the purpose of antagonizing the passage of that bill, and after a good deal of work and trouble and arguments before a committee and the Senate in open session, the bill was de*afe*ted and from that time continuously until the reorganization in July 1898 there was no city government—legal city government. The committee alone was acting. I don't recall all of the parties on that committee, although I do recall some of them.

Mr. Fitzgerald: To all of which testimony the plaintiff objects first because — is incompetent, immaterial and irrelevant, second because it is an attempt of his testimony to override the recognized way and mode of proving such matters, to wit; the records, which should speak for themselves; and third, because all the different acts of the Legislature or of the City of Clarksdale are matters of record and speak for themselves; and fourth, because such matters as are not covered by those objections are immaterial and irrelevant, referring thereto as to the work done by counsel and Mr. Percy and others as to the keeping such *Legislature* from passing.

Judge Minor: That is a fact as between January 11th, 1898 and July 11th, 1898, the Town of Clarksdale was without officers?

(Witness:)

A. Yes sir. That is a fact.

Mr. Fitzgerald: We object, as the records speak for themselves also for the reason that it is incompetent, immaterial and irrelevant to the points at issue.

119 Judge Minor: This committee of Messrs. Holland, Cutrer and Anderson, which is referred to in the proceedings of the Board of Mayor and Aldermen which you have read in evidence, was appointed by what authority?

A. By a mass meeting of the tax payers and citizens of the town of Clarksdale.

Q. At the time I understood you to say there was no officers of the city or town of Clarksdale.

Counsel for complainant makes objection the same as above.

A. I was present as one of the attorneys in the Pacific Improvement Company case referred to at the request, and according to my best recollection at this time, appeared Mr. J. W. Cutrer who had been the attorney for the City of Clarksdale in that case. I didn't personally attend the meeting, but was in the city. I knew what was done and was here for the purpose of indicating to these gentlemen who were having the meeting whether I thought the proposition

which they then authorized Messrs. Holland, Cutrer and Anderson to submit would or would not be accepted.

Mr. Fitzgerald: We make the same objection as before, as being incompetent, immaterial and irrelevant.

Q. Who represented the defendant in the case of Pacific Improvement Company vs. Clarksdale?

A. J. W. Cutrer had been the attorney for the city for quite a while antedating the commencement of this suit and he was the sole attorney representing the defendant in that suit, and when the city reorganized in July 1898, my distinct recollection is that Mr. Cutrer was again elected city attorney, and in the main occupied that position for a long number of years.

Q. Mr. Cutrer is a lawyer of ability and capacity, and was then?

Mr. Fitzgerald: We object, as it is incompetent, immaterial and irrelevant.

(Objection overruled. Counsel excepts.)

A. He is in my opinion and was at that time.

120 Q. What other lawyer besides you and Mr. Cummins was representing the plaintiff in this Pacific Improvement case?

A. Until after the death of Mr. Cummins, I had no knowledge of any other lawyer in the case than he and myself, but later on he died and then Mr. W. A. Percy of Memphis, Tennessee, represented the interest and the interest of the Pacific Improvement Company.

Q. Is Mr. W. A. Percy living or dead?

A. He is dead.

Q. About how long has he been dead?

A. About two or two and one-half years.

(Complainant objects to question as incompetent, immaterial and irrelevant.)

(By Mr. Fitzgerald:)

Q. What professional connection, if any, did you have with the Louisville, New Orleans & Texas Railway Company?

A. I was local attorney for that company in Coahoma County, Miss., for, if I recollect, in the latter part of 1883-84 until it was absorbed or consolidated with the Yazoo & Mississippi Valley Railroad Company. Since that time I have been continuously representing in the same capacity the Yazoo & Mississippi Valley Railroad Company.

Q. Did you, or did you not, know Mr. James M. Edwards?

A. I knew him very well indeed—intimate with him.

Q. Vice-President of the L. N. O. & T.?

A. Yes sir. He was.

Q. Mr. Scott, here is a paper which is exhibit A to the testimony of Mr. Fitzgerald and bears his initials and purports to be a certificate of stock of the L. N. O. & T. for 250 shares issued to the City

of Clarksdale, being No. 147 and dated April 27, 1891. Are you able to say whether that is Mr. Edwards' signature?

A. As I have said, I was not only intimately acquainted with Mr. Edwards, who was vice-president of this company from the time I became associated with it, if I recollect correct, from that time

121 to the time of reorganization. During that time I had hundreds of letters signed by Major Edwards and was called upon to pass on deeds, contracts and numerous other documents signed by him, and was therefore very familiar with his signature. I would say that this paper that you have handed me was signed by him.

Q. Was he vice-president of the Louisville, New Orleans & Texas Railway at that time?

A. Yes.

Q. Are you familiar with the seal of the L. N. O. & T. Ry. Co.?

A. Well, only you might say in a perfunctory way. I have seen the seal on many, many papers and it is a seal similar to this on this paper.

Q. From your knowledge of the business of the Louisville, New Orleans & Texas Railway Company and your vision of former documents executed by it, which you handled, will you please say whether or not the seal on that stock certificate No. 147 is the official seal of the Louisville, New Orleans & Texas Railway Company at that time?

A. All that I can say about that is that the seal used by that company was, according to my recollection, the same seal that was used on this paper.

Q. Mr. Scott, this litigation that has been referred to by the Pacific Improvement Company vs. Clarksdale was greatly contested, was it not?

A. Yes sir. It was vigorously contested—went to the court of appeals twice.

Mr. Fitzgerald: We object, as it is immaterial, incompetent and irrelevant. We have admitted it was contested.

By the Court: Let it go in.

Mr. Minor: Mr. Scott, you said you knew Mr. Edwards a long while. State whether or not Mr. Edwards would have executed a paper that was not genuine?

122 A. That would only be a matter of opinion.

Q. Based on your acquaintance with him?

A. It is my opinion that he would not any more than I would or any other gentleman.

Q. Now, Mr. Scott, in taking that paper, would you say there of your knowledge of Mr. Edwards, of your knowledge of the affairs of the Louisville, New Orleans & Texas Railway Company as its attorney for a long number of years, please state whether or not it is the original certificate of stock.

Mr. Fitzgerald: We object, as it is immaterial, incompetent and irrelevant.

By the Court: I think the statement in regard to what Mr. Ed-

wards would have done in regard to executing a forgery is incompetent, but let it go in for the present.

A. Well yes, I would say, without any further knowledge that in my judgment and opinion this is the original certificate of stock which it purports to be, issued by the Louisville, New Orleans & Texas Railway Company to the City of Clarksdale, Mississippi.

Complainant objects. Ruling is reserved.

Judge Minor: In the course of that litigation with the Pacific Improvement Company and that argument before the legislature, what position did the City of Clarksdale take with respect to the value of that stock?

Mr. Fitzgerald: We object.

By the Court: Go ahead. Answer the question. Ruling is reserved.

A. They did take the position and offered evidence to prove that the stock was at that time worthless, and if I am not mistaken Major R. H. Wildberger was offered as a witness to prove the worthlessness of the stock and that objection was made and the Court sustained the objection and that was one ground of assignment made by Cutrer in the district court, because he was not permitted to prove the
123 stock was worthless.

Q. I here show you the abstract of assignment of errors to proof of Mr. Cutrer, the attorney for Clarksdale on the second appeal in the Pacific Improvement Company case and call your attention to page 13 and ask if there is not an assignment of error there that the trial court erred in refusing to permit a witness to testify that the said stock during the period aforesaid was absolutely worthless?

A. I know that that was his contention throughout the case. (Looks at paper.) Yes sir, that is true. One of the assignments of error as I have already stated it was the refusal to permit the witness to testify what was the value of the capital stock.

Cross-examination.

By Mr. Fitzgerald:

Q. You say that the contention of Mr. Cutrer was that this stock was worthless?
A. Yes sir.
Q. The contention of your client was that it was worth something.
A. We were never called upon to answer that proposition.
Q. You object to the introduction of the testimony?
A. Yes sir.
Q. You thought it was incompetent, immaterial and irrelevant?
A. I did at that litigation.
Q. Yes sir. Now you say that you knew J. M. Edwards well?
A. I knew him very well indeed.

Q. You knew his signature?
A. Yes.
Q. When did he sever his connection with the railroad company?
A. It was some time, according to my best recollection, late in the nin-ties.
124 Q. Wasn't it 1889?
A. That is not my recollection.
Q. You know the date of the consolidation of the two roads?
A. I know it was sometime in the nineties.
Q. May I refresh your memory, it was 1889?
A. It may have been.
Q. After that time you didn't receive many letters from Edwards?
A. I don't recollect, Mr. Fitzgerald.
Q. You are testifying now from the correspondence you received some twenty years ago, since 1889.
A. I don't think that I would be at all at fault if I were to see your signature if I happened to have the good fortune to live 25 years more, I think I would know your signature.
Q. I ask you the question if that isn't true?
A. What was the question?
Q. The question was if you were not testifying to Mr. Edwards' signature to this piece of paper from your recollection of his signature many years ago.
A. Yes sir.
Q. You stated that Mr. Edwards would not sign any thing that was not genuine?
A. Yes sir. That is my opinion of the man.
Q. You don't mean to say that he would not sign his name several times? I mean to say that because his signature appears on this piece of paper does not mean that that was the original stock.
A. I don't know that it does. It is merely a matter of opinion.
Q. That was the way you answered. It was your opinion. Upon what do you base that opinion?
A. I base it upon the fact that it bears the signature of the vice-president of the Louisville, New Orleans & Texas Railway Co. that it has the seal of the company affixed to it, that it appears to be
125 and reads as a certificate of stock, and upon the fact that it is substantially identical with the copy of the stock which you filed as exhibit A to your original bill.
Q. You never saw this original certificate before or since this suit have you?
A. We, I have seen it since this suit.
Q. How long before today did you see it?
A. I saw it, I believe, shortly after your bill was filed.
Q. But you don't know where it came from?
A. No sir.
Q. You never received the certificate of stock from the person whom it was purchased from?
A. No.
Q. You don't know that this certificate that was purchased except from hearsay?

A. Only from what I have been told.

Q. And you go, as I have said, by the looks of the certificate and by the signature of Mr. Edwards?

A. That and the other facts mentioned.

Q. As to the marskings on the certificate and the endorsements thereon, you know nothing?

A. Nothing at all.

Q. Don't know whether they are genuine or spurious, nor who put them there?

A. I have no idea who put them there.

Q. You don't know anything about the value of this stock, do you?

A. No. I don't. If it has any market value, I don't know it. I know, Mr. Fitzgerald, that it is not listed on any of the exchanges in New York, Chicago and other moneyed centers, and I know from that it has not paid dividends. It has not been a dividend
126 paying stock.

Q. You also know as a business man who keeps up with these matters that the Standard Oil Company stock is not listed in any exchange in the world.

A. I couldn't answer. I never owned any stock, never had any occasion to look for it.

Q. How do you know about the Y. & M. V. stock?

A. Because of my long association with the company and having been frequently associated with railroad stocks, sometimes unfortunately and having kept up with the Y. & M. V. stock, and it occurred to me frequently as being strange that the Y. & M. V. stock was not quoted, until I investigated further and found out.

Q. What investigation did you make?

A. I made an investigation by taking the quotations from the Wall Street Journal, for which I have been a subscriber for quite a long time, and the New York Times and other papers that report the dealings in different kinds of stock and found there was no dealings——

Q. You have been the attorney for the Y. & M. V. R. R. Co. since its consolidation with the L. N. O. & T. Rwy. Co., and also the L. N. O. & T. Rwy. Co. from its completion and until it was consolidated? Please state to the court whether you know anything about the transactions as to the consolidation of these roads and who now owns the stock of those roads.

A. I do not, Mr. Fitzgerald; never was consulted or even thought on that subject.

Q. Do you know that the Mississippi Valley Company is?

A. Nothing only what I read from a recent lawsuit they in Jackson.

Q. Do you know what the stock in the Mississippi Valley Company is worth?

127 A. No, I do not.

Q. You stated that you kept up with the I. C. quotations. I judge by that you mean the Illinois Central Railroad Company?

A. Yes.

Q. Do you know what connection the I. C. has with the Mississippi Valley Company?

A. I do not. The truth is, I never heard of that company until the revenue agent sought to tax it and the most information I have gotten about it is from you.

Mr. Fitzgerald: We will ask a subpœna, if it please the Court, for the Yazoo & Mississippi Valley Railroad Company to be served on the principal officer of the town as a witness as an adverse party.

Judge Minor: Mr. Fitzgerald said you knew about the transfer of this certificate only by what you heard. You do know about the execution of the sale and return of the marshal in the case of the Pacific Improvement Company vs. Clarksdale.

A. Well, I know that from the examination of the papers, and I know about the issuance of the execution, but was not present when the sale was made.

Mr. Fitzgerald objects.

(Witness continues:) I knew at the time of the sale that the sale was made, but was not present.

Q. Will you kindly look at the signature of A. J. Cooke, United States Marshal, on the fi. fa. issued in said Pacific Improvement Company case, and also at the signature of A. J. Cooke, United States Marshal, written at the foot of the indorsement on the certificate of stock about which we have been talking.

(Witness looks at paper.)

A. Well, Judge, I am not in any sense an expert in handwriting and I think these papers speak for themselves better than I could give an opinion. The two signatures, all that I can say is
128 they look very much alike, but whether they are the same, I do not know and would not undertake to testify. I never saw Mr. Cooke's signature before I saw these two on this paper.

Judge Minor: If your Honor please, Mr. Fitzgerald has agreed that defendants may hand to the chancellor the original fi. fa. in the Pacific Improvement case for the purpose of seeing the signature of the marshal thereto, and that as said paper can not be put in evidence, because it is an original paper of another court, the defendant may substitute therefor a photographic copy, stating of course, all objections.

Mr. Fitzgerald: We object, as it is incompetent, immaterial and irrelevant and the further objection that in our opinion the court has no right to compare signatures on a piece of paper for the purpose of identifying the signature on another piece of paper as being incompetent, irrelevant and immaterial, because no United States Marshal has any authority by right of law to make any return or any statement on anything but an original paper, which he must return to the clerk, showing any action that may have been taken by him supposed to be official. Why, if that was the case, a United States Marshal could just write out anything he wanted to and n

objection, and there is no use in comparing signatures where neither one have proved to be original.

(Ruling is reserved.)

Judge Minor: Defendant now offers in evidence the paper which is made Exhibit A to the testimony of Mr. Fitzgerald, same purporting to be the certificate of stock No. 147, to two hundred and fifty shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, issued to the City of Clarksdale, dated April 29th, 1891, together with the writing in ink on the back thereof, purporting to be signed December 6, 1897 by A. J. Cooke, United States Marshal.

129 Mr. Fitzgerald: To which complainant objects for the reasons already assigned and asks permission of the court to file written objections to each and every one of the documents hereinbefore introduced.

Judge Minor (addressing the witness): Mr. Fitzgerald suggested to you that the consolidation of the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company occurred in 1889. I will show you exhibit B to this bill which he has introduced as evidence, showing said consolidation, and ask you if it does not show to have occurred in October, 1892.

A. That was according to my recollection, that it was sometime in the nineties. (Looking at paper.) The 24th day of October, 1892 is the date of the consolidation as shown by exhibit B to the complainant's original bill.

Q. If the court please, I am not quite sure as to just what language I used yesterday, but to make the matter clear, I now say that I intended to offer and did offer in evidence all the documents which I read to Your Honor.

The defendant rests.

Mr. Fitzgerald: If the court please, while counsel is renewing this offering of papers and documents, I desire to renew my objections to his withdrawing certain documents which he offered to the court, to wit: First, the alias fieri facies or duplicate fieri facias that was issued to the Marshal of the Southern District of Mississippi attached to which is an answer of the Y. & M. V. R. R. Co. in pursuance of the statute authorizing the levy on stock of a corporation also I renew my objection to the withdrawal by the defendant of the answer of the Y. & M. V. R. R. Co. filed to the alias fieri facias issued from the Northern District of Mississippi to the Marshal of the South-

130 ern District of Mississippi, and which was not attached to that fieri facias and which instrument was first read to the court by the defendant and then withdrawn.

Judge Minor: In response to those objections, I did not read the alias execution, but read a small portion of what purported to be a return, and then observing that I was introducing that inadvertently, I desisted from reading it and didn't read the return on the alias, as paragraph as to the answer of the Y. & M. V. which I read

A. No, I was elected in 1906.
Q. Was that first or last term?
A. Last term.
Q. How long did you serve?
A. One year.
Q. Had you been elected previously?
A. Yes, sir. Two years previous to that time.
Q. Between the time you were first elected in 1904, who then served before your second election?
A. Mr. Moore.
Q. How long did he serve?
A. Two years.
Q. Now during your incumbency as Mayor of the City of Clarksdale, Mr. Culley, what if any investigation or search was made by you and the Board, either officially or otherwise, for a certain certificate of stock or share *of* interest of the City of Clarksdale in the Yazoo & Mississippi Valley Railroad Company or Louisville, New Orleans & Texas Railway Company which had been issued to it many years before?

Judge Minor: Defendant notes same objection as that made to the testimony of the previous witness, because this evidence should have been made in chief.

By the Court: Go ahead and answer it.

(Defendant excepts.)

A. Well, every time the question of paying interest would
134 come up we would all say something about it and want to know where the stock was.
Q. What, if any, order did you give to your attorney?
A. I told the attorney to make an effort to get the stock, but don't think there was any official——
Q. Was ever any search made to see if you could find it?
A. I could not tell you.
Q. Did you ever find it?
A. No sir.
Q. Do you know why?
A. No sir.
Judge Minor: Who was your city attorney during your administration?
A. J. W. Cutrer.
Q. Did Mr. Cutrer ever make any report telling you what became of the stock?
A. Not to me, no sir.
Q. So no report was ever made and the Board didn't know what became of it?
A. No sir.

Defendant objects to the statement of the witness as to the knowledge of the Board.

Court sustains objection. Complainant excepts.

M. J. BOLEN, witness for complainant.

Direct examination.

By Mr. Fitzgerald:

Q. This is Mr. M. J. Bolen?
A. Yes sir.
Q. Mr. Dolen, what official position did you at one time occupy in the City of Clarksdale?
A. Well, I held the position of member of the Board of
135 Mayor and Aldermen three or four years, then was mayor for four years--two terms.
Q. During your incumbency in office, please state whether or not you attempted to find out what became of the stock shares or interest of the City of Clarksdale in the Louisville, New Orleans & Texas Railway Company or the Yazoo & Mississippi Valley Railroad Company, which had been purchased by them many years before.

Judge Minor: We make the same objections as before.
By the Court: Go ahead and answer it.

A. Yes, I was very much interested in trying to secure this stock and used my best efforts to do so a number of times; in fact, when I was an alderman, the city passed an order requesting the city attorney to go into the matter and if possible to locate and secure the stock. Several years later, after I had been elected Mayor, on my own initiative, without any record being made on the minutes of the board as mayor, I employed Mr. W. A. Percy in this matter with a view of securing this stock.
Q. Now, what other lawyer did you afterwards employ?
A. Mr. Julian Wilson
Q. Did either of them ever really find or give you any definite answer in regard to the stock?
A. Mr. Percy did.
Q. Do you know Edward S. Elliott & Company, accountants of Memphis?
A. I know of them.
Q. I will ask whether or not at your direction, or the direction of the board, Edward S. Elliott & Company ever made an audit of the books of the City of Clarksdale in an effort to find out the conditions of the books and trace this stock?
A. My recollection is that when I was a member of the board of Aldermen that this audit of the city affairs was made by
136 Elliott and to the best of my recollection——
Q. Did Mr. Elliott turn over to you the original letter which I hand here? (Handing witness paper.)
A. To the best of my recollection, I had the original of this. The entire file of papers have been misplaced or lost. I have made search for them, but so far have been unable to locate them. I will state further that this file of papers contained correspondence from Mr. Percy and Mr. Wilson both with reference to the matter

you. Read the letter carefully and let me know if that is part of the correspondence which you say you had and lost and have made search for and cannot find?

Judge Minor: Mr. Fitzgerald, I understand that the paper you handed him says on its face that it is not an original, but a copy.

Witness: The letter is very familiar to me.

Mr. Fitzgerald: Is that a part of the correspondence that was sent you by Mr. Percy and by you placed with the other correspondence and lost?

A. To the best of my recollection it is.

Q. You have made search, as I understand, for the original of all that correspondence?

A. Yes, sir, but have not been able to locate it.

Judge Minor: This letter being a letter from Mr. W. A. Percy to Mr. Tweed, how did you get hold of the original, which must have been in Mr. Tweed's possession?

A. Well, I say this is very familiar to me. It was the copy of the letter or the original letter I had—I could not say positively which I had.

Mr. Fitzgerald: Sent you by whom?

A. Mr. Percy. He either sent it to me or read it to me or showed it to me in the office.

Q. We offer this copy of a letter from W. A. Percy to Mr. Charles H. Tweed, dated Memphis, Tenn., October 23, 1911, in evidence for the sole purpose, may it please the Court, of not showing or
141 proving anything by its contents, but simply that the Town of Clarksdale was using the best efforts to investigate and find out what became of that stock, and we really don't care for the court to consider as evidence anything said in the letter, but simply introduce the letter as an exhibit to Mr. Bolen's testimony for the reasons aforesaid.

Judge Minor: The defendant objects for the same reasons stated in its objection to the former letter of Mr. Percy, and for the additional reason that this letter shows on its face that it is a letter of Mr. Percy to Mr. Tweed of New York, who necessarily must have the original, and the only proper way to prove that letter is to produce Mr. Tweed, the custodian of th-se documents.

By the Court: I think this letter is incompetent. I don't know what it contains, but it seems to be a copy of a letter that Mr. Percy wrote to some New York man.

Mr. Fitzgerald: I will ask that you initial this, Mr. Bolen. M. J. B. No. 2.

The said exhibit M. J. B. No. 2 is in words and figures following to wit:

42 "M. J. B. #2.

(Copy.)

Memphis, Tenn.,

Oct. 3rd, 1911.

Mr. Chas. H. Tweed, 23 Broad Street, New York City.

My Dear Mr. Tweed: You may possibly recall the case of Pacific Improvement Company vs. City of Clarksdale, Miss., which was instituted in 1894 by Mr. Cummins, and upon his death I carried the case to a conclusion. You may remember that a certificate of stock, I think in the New Orleans, Baton Rouge, Vicksburg & Memphis short line, for $25,000, was issued and delivered to the City of Clarksdale in lieu of the bonds, upon part of which the suit was brought.

I had an execution to issue and had it levied upon the certificate of stock, complying with the statute by service of process upon the Yazoo & Mississippi Valley Railroad, with which the New Orleans, Baton Rouge, Vicksburg & Memphis Short Line had been consolidated, and by the physical seizure and sale of the certificate of stock. At the sale I bought the certificate of stock for $100 and then advised you of the fact and asked if you desired to take the certificate over for the Pacific Improvement Company, and if you did not I would be glad to hold on to the purchase. I believe that you had written me before that the Pacific Improvement Company did not care to bid at the sale. You concluded to take over the certificate and I sent it to you.

Later—I should think it must have been about 1898, and after my connection with the case had ceased entirely—you made a settlement with the City of Clarksdale. My recollection is that you told me in a general way that settlement was effected by you abating the unpaid coupons and that you delivered back to the City one certificate of stock.

Recently the Mayor of the City of Clarksdale asked me if
43 I could locate this certificate of stock for him, and it is to answer his request that I am writing you. Can you tell me what became of the certificate of stock; was it turned over to the City or its attorney, who, I believe, was Mr. John Cutrer. I would appreciate an answer.

Though I have not seen you in more than a decade, I am glad to learn from mutual acquaintances that you continue in good health.

Very sincerely yours,

(Signed) W. A. PERCY.

Exhibit "I" to Statement of facts.

Mr. Scott: From your correspondance with Mr. Percy, and your investigations made through him and through Mr. Wilson, you and the Board knew as early as 1907 that this certificate of stock in ques-

tion had been sold under an execution in the Pacific Improvement Company case, did you not?

A. Well, it was my information that it had been sold.

Q. You knew it from the fact that you had been told by both of your attorneys?

A. I had heard that it had been bought in by Mr. Percy for $100.00.

Q. Mr. Percy had told you that was the case, and subsequently I believe you had Mr. Julian Wilson——

A. Yes sir. Mr. Percy said that it would embarrass him, as he found his connection previously with the matter would prevent him going further.

144 Q. And then you consulted with Mr. Julian Wilson?

A. I did.

Q. And you then ascertained again from or through him that the stock had been sold under execution of the United States Marshal?

A. No sir. Not through hi-. He didn't tell me anything about that. But I knew that b-fore. It was my understanding that it had been sold.

Q. In what year, do you remember, when you had Mr. Wilson?

A. The last year I was mayor, I think, about four years ago.

Q. The letter from Mr. Percy in 1907, or just after that?

A. It was sometime after that—I don't know.

Q. In 1907 you had Mr. Percy?

A. No, I think I was member of the Board of Aldermen at that time. I don't know -*eh*ther it was 1907 that I saw Percy.

Q. Could you refresh yourself about that?

A. I might be able to do it or find some of the data.

Q. I will ask you by reference to the minutes of the city *of* otherwise that you refresh yourself and advise us a little later during the day.

A. I will if I can, Mr. Scott. I am just out of bed from grippe two weeks and if I am well *a*nough I will try to find out.

Q. As a result of all that correspondence you had with Percy and Julian Wilson, nothing further was done by either one of you.

A. No sir—Mr. Wilson told me——

Mr. Fitzgerald: We object, for the reason that it is incompetent, immaterial and irrelevant, as to what may be an attorney's opinion about anything.

(Court overrules objection.) Counsel excepts.

Mr. Fitzgerald: I want here to reserve the right to insist on the court taking what Mr. Percy s*aus* as evidence. I myself considered it no evidence because what passed between them I didn't think was competent, but if that is——

Mr. Scott: Did you not start to say when interrupt*on* by

145 Mr. Fitzgerald that Mr. Wilson told you something?

A. Yes.

Q. What was it?

A. I was going to state that I was advised by Mr. Wilson and also

by Mr. Percy with reference to the case. Mr. Wilson said that he didn't think there was anything in the case and could not go any further with it was the reason I dropped it. Mr. Percy said it was a good case and there was not any doubt about the city winning it, but he couldn't go on with it, but Mr. Percy was dead when I was talking to Mr. Wilson.

Mr. Scott: If the Court please, we note an objection to what the witness has said with reference to the advice given him by his attorney, Mr. Percy, because it is self-serving evidence and therefore inadmissable. Your Honor will reserve ruling, I presume.

By the Court: All right.

Q. When did you first see the copy of this letter written by Mr. Percy to Elliott & Company of October 1907?

A. I don't know, Mr. Scott, I couldn't tell you. I suppose after I took the matter up with Mr. Percy. I don't know how long he had had the copy.

Q. How long had you had the copy?

A. I am satisfied I have seen it.

Q. Of course, from the time you saw that copy, from that dacte on you knew that stock had been sold under an execution by the United States Marshal.

A. I knew that all the time. Both before and after.

Mr. Fitzgerald: We object to that part of his testimony for this reason, may it please the court, that in our opinion it makes no difference if he knew what became of it, that the statute of limitations cannot possibly run against a city or municipality under the constitution, and that would have no bearing on this case. I
146 don't care for Your Honor to rule on it.

Mr. Fitzgerald: I now introduce, if the Court please, a certificate of the Chief Office Deputy United States Marshal, dated April 11, 1918. This, I believe, has been introduced before, but I didn't see the mark on it. I desire to read this to the court. (Reads.)

Judge Minor: The defendant makes the same objections as originally.

The said Exhibit "B" of Mr. Fitzgerald's testimony is in words and figures, following, to wit:

147 "EXHIBIT 'B' TO MR. FITZGERALD'S TESTIMONY."

I, J. J. Vance, Chief Office Deputy United States Marshal of the Northern District of Mississippi, hereby certify that I have carefully examined the entries of process in the United States Marshal's Civil Docket, during the period commencing August 12th, 1897, up to January 1st, 1904, and failed to find any record of a writ of venditioni exponas issued December 23, 1897, in the case of Pacific Improvement Company vs. The Town, or City of Clarksdale, Mississippi,

No. 3900 on the docket of the Circuit Court of the United States for the Western Division of the Northern District of Mississippi.

This the 11th day of April, 1918.

J. J. VANCE,
Chief Office Deputy U. S. Marshal.

Exhibit B of Mr. Fitzgerald's testimony. L. L. Goings, Steno

148 Mr. Fitzgerald: I now desire to introduce a certificate o L. A. Oldham, clerk, showing a copy of the judgment rule and index No. 1, United States Circuit Court of Northern District, Western Division of the State of Mississippi, which shows a judgmen entered direct and refers to the Pacific Improvement Company vs City or Town of Clarksdale in the amount of $3,058.13 and nev cancellation of entry of any credit on said judgment. I will kee that and have the stenographer to initial it so as to show the exhibit

The said exhibit is in words and figures following to wit:

Judgment-roll and Index 1.

U. S. Circuit Court, Northern District Miss., Western Division.

Direct Index.

Plaintiff's name.	Defendant's name.	No.	Amount of judgment.	Date of judgment. Mo. Year. Day.
Pacific Improvement Co.	City (or town) of Clarksdale.	3900	3,058.13	June, 1896, 2nd

Reverse Index.

Plaintiff's name.	Defendant's name.	No.	Amount of judgment.	Date of judgment. Mo. Day. Year.
City (or town) of Clarksdale.	Pacific Improvement Co.	3900	3,048.13	June 2, 1896

THE UNITED STATES OF AMERICA,
Northern District of Mississippi

I, L. E. Oldham, Clerk of the District Court of the United States for the Northern District of Mississippi, hereby certify that the above and foregoing is a true and correct copy of the entries made on the Judgment Roll of said Court, in the case of Pacific Improvement Company vs. City (or town) of Clarksdale, No. 3900, as the same appears of record now *in* file in my office.

Given under my hand and seal of said court, at Oxford, this the 23d day of February, 1917.

L. E. OLDHAM, *Clerk.*
By H. A. MOORE,
Chief Deputy Clerk.

Exhibit "E" to statement of facts.

Clerk's fee 45 cents.

150 Mr. Fitzgerald: I now desire to introduce a certificate of L. E. Oldham, Clerk of the United States Court at Oxford, Mississippi, dated the 11th day of May, 1917, which I will ask that stenographer also to initial. I will read it to the court.

The said exhibit L. L. G. in words and figures following, to wit:

151*a* In the District Court of the United States for the Western Division of the Northern District of Mississippi.

No. 3900.

THE PACIFIC IMPROVEMENT COMPANY

vs.

THE CITY (or TOWN) OF CLARKSDALE, MISSISSIPPI.

I, L. E. Oldham, Clerk of the District Court of the United State for the Northern District of Mississippi, do hereby certify the Cour Docket of the above styled cause shows that a writ of Vendition Exponas was issued on Dec. 3, 1897, but no return on same was en tered on said docket nor is there any other reference or entry of an nature as to this writ, on said docket, the said entry reads:

"1897.
Dec. 3. Issuing Vendi $1.7

Given under my hand and the seal of said Court, at Oxford this th 9th day of April, 1918.
[SEAL.]

L. E. OLDHAM, *Clerk.*
By H. A. MOORE,
Chief Deputy Clerk.

151 "EXHIBIT L. L. G."

UNITED STATES OF AMERICA:

I, L. E. Oldham, Clerk of the United States District Court of the Northern District of Mississippi, and Custodian of the Minute Books of the United States Circuit Court for the Northern District of Mississippi, do hereby certify that I have made a careful and painstaking search of the pages of the Minute Books of the United States Circuit Court for the Northern District of Mississippi for the period shown by said Minutes between August 12th, 1897 and December 6th, 1897, inclusive, and that on the said Minute Books, during and including said dates, there is no entry, order, judgment or decree entered in reference to, or in any wise appertaining to the suit of the Pacific Improvement Company vs. City of Clarksdale, Number 3900, then a pending case in the United States Circuit Court for the Northern District of Mississippi.

Witness my hand and official seal, this the 11th day of May, 1917.
[SEAL.] L. E. OLDHAM, *Clerk*,
By H. A. MOORE,
Chief Deputy Clerk.

Exhibit "D" to statement of facts.

152 Mr. Fitzgerald: I now introduce a certificate of the United States Marshal showing Marshal's Docket No. 52 in case court No. 3900, parties Pacific Improvement Company, attorney, W. A. Percy, vs. the City or Town of Clarksdale, Mississippi, attorney (blank) showing the nature of process issued and the returns thereon, which I will ask the stenographer to initial. I will read that to the Court.

(Reads to the Court.)

The said exhibit L. L. G. in words and figures, following, to wit:

153 Marshal's No.: 52.
Court No.: 3900.

Parties and attorneys: Pacific Improvement Co., Attorney, W. A. Percy, vs. The Town or City of Clarksdale, Miss., Attorney ——— ———.

Nature of Process: Execution.

Process issued: Date: Aug. 12, 1897. Place: Oxford. Court: Circuit.

Date Returnable: ——— —, ———.

Process Received: Dated ——— —, ———. Place: Oxford. Manner: By Hand.

Process Delivered for Service: Date: Aug. 12, 1897. Place: Oxford. Manner and to Whom: By Hand to J. W. Cooke.

Return (Showing when, where, Upon Whom, How, and By Whom Service was Made):

Served Aug. 14, 1897, at Clarksdale on W. D. Chapman, "by delivering to him in person a true copy of the same."

(Signed) J. W. COOKE,
Office Deputy.

"And taking into custody one certificate of stock for 250 shares of $100.00 each in the Louisville, New Orleans and Texas R. R."

(Signed) J. W. COOKE.

Fees: .5; Miles @ 6¢, $9.06; service, $2.00.
Expenses: —.
F. and E. Record Page: —.
Ledger Page: 11.
Account, Nature, Source, and Disposition of Receipts: Date: Aug. 14, 1897. Amy. Received: $15.00. Nature: —. Source: Plaintiff. Date: Aug. 14, 1897. Amt. Paid: $15.00, $5.00 Nature and Disposition: Paid to Clerk of Ct. Paid to Clerk 12/9/97. Receipt of Payee: $93.82.

154 Received of Alex J. Cooke, U. S., Ninety Three & 82/100 Dollars $88.82 of which is to be applied to the costs in said cause generally and $5.00 to the Marshal's cost & to be paid over to the U. S. for which I have signed duplicate receipts.
Dec. 9, 1897.

G. R. HILL, *Clerk.*

Y. & M. V. R. R. Co.

vs.

O'DALE.

UNITED STATES OF AMERICA,
Northern District of Mississippi, ss:

I, W. S. Vardaman, United States Marshal for the Northern District of the State of Mississippi, and custodian of all the records of the United States Marshal's Office for said District, including the United States Marshal's Civil Docket No. One, do hereby certify that the foregoing page contains a full true, and correct copy of page 13 of the United States Marshal's docket for the Northern District of Mississippi, in so far as the same has reference to the case of the Pacific Improvement Company vs. the City of Clarksdale, No. 3900.

Witness my hand as United States Marshal for the said District, this the 28th day of March, 1917.

W. S. VARDAMAN,
United States Marshal.
By J. J. VANCE,
Chief Office Deputy Marshal.

L. L. G.

155 Mr. Fitzgerald: I now desire to introduce an assignment by the Planters Bank to the City of Clarksdale on the 24th day of March, 1917 which I will read to the Court. (Reads.)

Judge Minor: We object to the consideration as evidence of the recital in this paper to the effect that the Planters Bank acted as agent and representative of the town of Clarksdale in that settlement.

By the Court: All right.

The said exhibit L. L. G, in words and figures following, to wit:

156 Whereas, we, the undersigned, Planters Bank of the City of Clarksdale, acting as agents for the City or Town of Clarksdale, Mississippi, did, on or about the 30th day of June, 1898, settle by payment in full the claims of the Pacific Improvement Company and R. T. Wilson & Company and L. N. O. & T. Railway Company; and

Whereas, the said R. T. Wilson & Company and the Pacific Improvement Company transferred to us their entire interest in and to any claims, legal or equitable, as against the City of Clarksdale with reference to a suit, or suits, theretofore pending in the United States Court at Oxford, Mississippi, being styled "Pacific Improvement Company vs. the City or Town of Clarksdale," and number 3900 on the docket of the Circuit Court of the United States for the Western Division of the Northern District of Mississippi, and another suit styled "R. T. Wilson & Company vs. City of Clarksdale," pending in the United States Court, the number of which last named suit is not now recalled; and,

Whereas, the City or Town of Clarksdale, Mississippi, has since said settlement and transfer paid us, the undersigned, each all and every expense and costs and monies expended by us in said settlement,

Now, therefore, in consideration of said payment and of the further consideration of one dollar, cash in hand paid to us by the City of Clarksdale, the receipt of which is hereby acknowledged, we do hereby sell, assign, transfer, set over and deliver to the City or Town of Clarksdale, Mississippi any and all interests and rights, both legal and equitable, which may have been acquired by us from the said Pacific Improvement Company, R. T. Wilson & Company, or the L. N. O. & T. Railway Company by virtue of said settlement of the said described suits by us with them hereby assigning and delivering to the said City of Clarksdale any and all rights, both legal and equitable, which we may have acquired by virtue of the settlement, specially including the right to the proceeds of any execution issued in any of said causes, and specifically designating as a part
157 thereof any right, title or interest in and to stock Certificate No. 147 of the L. N. O. & T. Railway Company supposed to have been levied upon August 13th, or 14th, 1897, in the said above styled suit, No. 3900, in said United States Court.

We do not by this transfer and assignment, guarantee to the City of Clarksdale that we have any rights of value, either legally or

equitable, but simply by this assignment transfer whatever rights we may have in the premises.

Witness our hands, this the 24th day of March, 1917.

PLANTERS BANK,
By W. P. HOLLAND, *President.*

L. L. G.

158 Mr. Fitzgerald: We further desire to introduce, may it please the Court, the original of the answer of the Yazoo & Mississippi Valley Railroad Company to a levy alleged to have been made previously by the Marshal of the Southern District of Mississippi, which answer is signed J. C. Welling and *id* dated the 13th day of October 1897, and I desire permission of the court, with the consent of counsel to withdraw this original and insert in the record a copy of it, which will be received by this and all other courts as the original by agreement. I will read this to the court.

(Reads.)

The original answer referred to will be found on pages 103, 103*a* and 103*b* of this record.

159 Mr. Fitzgerald: We desire to introduce another execution with all of its endorsements and of the return thereon, which was issued by J. R. Hill, Clerk of the United States District Court, third District of Mississippi, addressed to the Marshal of the Southern District of Mississippi, which is dated the 27th day of November, 1897. I will ask the stenographer to initial this paper and also the answer of the Y. & M. V. attached thereto as a part of the return on that execution.

Judge Minor: To both of which papers the defendant objects as being immaterial and incompetent.

159*a* The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

We command you, as heretofore, that of the goods, and chattels, lands and tenements of defendant the City of Clarksdale, Mississippi, late of your district, you cause to be made the sum of Three thousand and Fifty eight Dollars and 13 cents, which the Pacific Improvement Company, lately, in the Circuit Court of the United States for the Western Division of the Northern Judicial District of Mississippi has received against it for its damages which it sustained by reason of the non-performance of a certain promise and assumption by said defendant to the said plaintiff made, with interest on the said sum at 6 per cent per annum, from the 2nd day of June, 1896 until paid also, the sum of Four Hundred and Eighty Nine Dollars and 9[illegible] cents, for its costs by it about its suit, in that behalf expended, whereof said defendant is convicted as appears to us of record. And that you have said moneys before the Judge of the Circuit Court of the United States, for the Western Division of the Northern District of Mis[illegible]

sissippi, at Oxford, on the first Monday in December next, to render to the said plaintiff for its damages and costs aforesaid and have then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Oxford, the first Monday of June, A. D. 1897, and 121 year of the Independence of the United States Issued the 27th day of November, A. D. 1897.

[SEAL.]

C. R. HILL, *Clerk.*

Bill of Costs.

Endorsed in form execution	$488.24
Issuing this alias Ex.	1.70
	$489.94

Endorsed on the back thereof is the following: No. 3900, to December Term, 1897. Pacific Improvement Company v. The City (or Town) of Clarksdale, Mississippi. Al. Fi. Fa.

159*b*

June 2nd 1896.

Judgment	$3,058.13
Clerk	26.40
Attorney	20.00
Marshal	3.00
Witness	71.60
Other Costs	386.94

Int. 6 per cent.

W. A. Percy, Attorney.

Marshal's Fee	$1.50
Levying execution	.50
	$2.00

Received Nov. 29, '97.

T. W. COLLINS, *Marshal.*
W. P. COLLINS,
Chief Office D.

Received the within writ the 29th day of November, 1897, and executed same on the 1st day of December, 1897, by levying upon the stock and shares or interest of defendant in the Louisville, New Orleans & Texas Railway Company and in the Yazoo & Mississippi Valley Railroad Company, and there declaring that I levied upon said stock, shares, or interest of the City or Town of Clarksdale, at the suit of the Pacific Improvement Company; and I then demanded of George R. Gordin, under oath, of the amount of the City or Town

of Clarksdale's stock, the number of its shares and the extent of its interests in such corporation.

(Across the above return in red ink is the following:) "See return inside."

Return.

Received the within writ the 29th day of November, 1897, and executed same on the 1st day of December, 1897 by levying upon the stock and shares or interest of the defendant in the Louisville, New Orleans & Texas Railway Company and in the Yazoo & 159c Mississippi Valley Railroad Company, by going to the office of said companies in Jackson, Mississippi, and there declaring that I levied upon said stock, shares or interest of the City or Town of Clarksdale, at the suit of the Pacific Improvement Company; and I then demanded of George R. Gordin, the agent of such corporation, then present, a statement in writing, under oath, of the amount of the city or town of Clarksdale's stock, the number of its shares, and the extent of its interest in such corporation, and I left with the said agent a copy of the said writ; and thereafter, on the 2nd day of November 1897, the said corporation by their attorneys, Mess. Mayes & Harris, delivered to me the statement in writing which is hereto attached and made a part of my return.

This December 2nd, 1897.

FRED W. COLLINS,
U. S. Marshal, Southern District of Mississippi.

Statement in Writing Attached.

UNITED STATES OF AMERICA,
Northern District of Mississippi, Western Division:

THE PACIFIC IMPROVEMENT COMPANY

vs.

THE CITY OF CLARKSDALE.

Comes the Yazoo & Mississippi Valley Railroad Company, said company being pretended to ha*be* been served in said cause with a notice and demand under section 3467 of the Annotated Code of 1892, and, protesting that said pretended notice of service and demand is null and void for want — conformity to the said sta*y*ute, in that the same were not given and made at the office or principal place of business of said Company within the meaning of said statute, and not hereby waiving or releasing any of the rights and defences agains*y* such pretended notice and demand—said company answers as follows:

First. That at the time of said service, as so pretended to be made the said City of Clarksdale had no stock in the said Yazoo & Mississippi Vall*y* Railroad Company, nor any interest in the same, ex-

cept as hereinafter set forth; nor has said city any stock or
159d interest in the same now, except as hereinafter set forth.

Second. The said Company was incorporated by an act of the Legislature of the State of Mississippi at its session of 1882, and organized thereunder. In the year 1884 the Louisville, New Orleans & Texas Railway Company was organized under certain acts of said Legislature, with a capital stock of five millions of dollars, which said Capital Stock was all issued shortly thereafter to the Financial Improvement Company in part payment for the construction and equipment by said last named company of the railroad of said L. N. O. & T. Railroad Company; said Improvement Company being a business corporation or association composed of this, the Pacific Improvement Company, and a certain firm of R. T. Wilson & Company, which two constituents held stock of, or interest in the said Financial Improvement Company in the proportions respectively of sixty and forty parts in one hundred.

In the year 1892, the said Louisville, New Orleans & Texas Railway Company was consolidated with, and merged into, the respondent and by their act of consolidation it was provided, among other things, that the original capital stocks of said two constituent companies should be for the present kept separate and distinct, but that in the stockholders' meetings of the consolidated company, the holders of L. N. O. & T. Railway stock should vote and have other privileges in proportion to amount, as if such stock had been converted into consolidated Yazoo & Mississippi Valley Railroad stock; and such is the general attitude of holders of such stock at this time. Whether the said City of Clarksdale holds or owns, or is in anywise entitled to any stock of or in the said L. N. O. & T. Ry. Co., or was at the time of the pretended service of said notice and demand, this respondent does not know and cannot say.

The said Financial Improvement Company not only received from the said L. N. O. & T. Ry. Co., the stock as aforesaid for the construction and equipment of said railway, but also it received all of the bonds of said railway company on the same consideration.
159e Early in the year 1892, and before the consolidation aforesaid, the said Financial Improvement Company, or the constituents thereof, the said Pacific Improvement Company and R. T. Wilson & Company, sold and delivered to the Mississippi Valley Company, a Mississippi promoting corporation, all of the said L. N. O. & T. Ry. stock and bonds then held by them, or any of them, as respondent believes, constituting a large majority of both such stocks and bonds, but not all of either of them, certain of each having been previously disposed of to third parties; but said Financial Improvement Company, while it thereby terminated its business connection with the said L. N. O. & T. Ry. Co. and its practical control of the same, did not deliver to its vendees, or to anyone, the stock books of said Railway Company, but now has the same in its possession, wherefore, respondent says that such stock books are not in its possession, and never have been in its possession, and it does not know what said books do or do not show in respect to the issuance of L. N.

O. & T. stock — said City of Clarksdale; nor does it know whether such stock ever issued to and received by said City of Clarksdale, or whether, if so issued and received, it has ever been issued or transferred, at the request of such city, or by the same, to any third party.

Thirdly. None of the books of this respondent show any such stocks of the L. N. O. & T. Ry. Co., to be held by said City; or show any transfer of such stock, if any was so issued and accepted, to any assignee of said city; nor does respondent know of any such holding or transfer; nor has it been notified of any such transfer, except that it is informed by letter of Mr. W. A. Percy, that a levy has been made, under a fi. fa. herein issued, on a certain certificate for 250 shares, as more fully shown by the record herein, and a sale of the same therein by the Marshal of this Court, and a purchase thereunder of said shares by the said Pacific Improvement Company. And now, having fully answered, this respondent, still protesting and insisting as above, prays to be dismissed etc.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By MAYES & HARRIS, *Att'ys.*

159*f* (Sgd.) J. C. WELLING.

Sworn to this the 13th day of October, 1897, and subscribed before me by J. C. Welling, Vice-President.

(Sgd.) JULIUS RINNE,
[SEAL.] *Notary Public, Cook County, Illinois.*

STATE OF MISSISSIPPI,
County of Hinds:

Sworn to on information and belief this the 2nd day of December, 1897 by George R. Gordin, Agent at Jackson, Miss., of the Yazoo & Mississippi Valley Railroad Co., and subscribed by him.

[SEAL.] F. B. NEAL,
Circuit Clerk,
By W. J. BROWN, JR., *D. C.*

G. R. GORDIN,
Agent Y. & M. V. R. R. Co.

UNITED STATES OF AMERICA,
State of Mississippi,
Western Division of the Northern District:

In the Circuit Court of the United States for the Division Aforesaid.

THE PACIFIC IMPROVEMENT COMPANY

vs.

THE CITY OF CLARKSDALE.

Comes the Yazoo & Mississippi Valley Railroad Company, and for supplement to the above answer hereinbefore filed, says that the stock

of the Louisville, New Orleans & Texas Railway Company, mentioned in said answer, has no market value, and said company has no means of determining whether it has any actual value, knows of no sales, and supposes that One Dollar per share would be as much as it could be sold for, if for that, to the best of the knowledge, information and belief of this company answering.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
(Sgd.) By J. C. WELLING, *Its Vice-President.*

Sworn to and subscribed before me this the 19th day of November, 1897.

[SEAL.] (Sgd.) JULIUS RINNE,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

159*g* Sworn to on information and belief, this the 2nd day of December, 1897, by George R. Gordin, Agent at Jackson, Miss. of the Yazoo & Mississippi Valley Railroad Company, and subscribed by him.

[SEAL.] F. B. NEAL,
Circuit Clerk,
By W. J. BROWN, JR., *D. C.*

G. R. GORFIN,
Agent Y. & M. V. R. R. Co.

160 Mr. Fitzgerald: With the permission of the Court we will withdraw all of the original papers which we have introduced out of the file of the Pacific Improvement Company against the City of Clarksdale, No. 3900, and by consent of counsel copies hereof which shall be received as the original.

Complainant rests.

Mr. HOLLAND, witness for defendant.

Direct examination.

By Mr. Scott:

Q. You are president of the Planters Bank of Clarksdale?
A. Yes sir.
Q. You were connected with that bank either as president or cashier since its organization?
A. Yes sir.
Q. When was it organized?
A. February 1896.
Q. In the year 1896, do you recall having been appointed as one of the committee of three, composed of Mr. J. W. Cutrer, Mr. E. L. Anderson and yourself for the purpose of going to New York City

to effect a compromise or settlement of the then existing claim of the Pacific Improvement — against the City of Clarksdale?

A. Yes sir.

Mr. Fitzgerald: We object, as it is incompetent, immaterial and irrelevant.

By the Court: Let *is* go in.

(Counsel excepts.)

Mr. Fitzgerald: We object to each question and answer of this witness that may be propounded.

Mr. Scott: At whose instance and request did this committee you have just spoken of go to New York to make the settlement?

161 A. Well, we had a mass meeting around here in town; in fact, as I remember we had several of them and these citizens asked us to *to* take up the bonds so they could organize, as all the officers had resigned and they didn't have any officers and wanted to get back and get incorporated as a town.

Q. As I understand, you gentlemen were appointed by the meeting of the citizens and tax payers of the Town of Clarksdale, with authority to go to New York to make a certain settlement of maximum amount.

A. Yes sir.

Mr. Fitzgerald: We object to counsel reciting what he understood the witness to say and the language of the witness only taken.

Mr. Scott: I shall try to conform to that rule, and think I did.

Q. When you went to New York, you and Mr. Cutrer and Mr. Anderson, as a committee, did you finally effect a settlement with the Pacific Improvement Company with reference to the bonds held by that Company and R. T. Wilson & Company, issued by the City of Clarksdale?

A. Yes.

Q. How many bonds were there, or do you remember the correct amount?

A. Twenty five thousand.

Q. At the time you were appointed as a committee, or a member of this committee, and went to New York, was there any officers of the town then officiating and acting?

A. No, sir.

Q. Do you recall at or about then the town reorganized by having officers appointed by the Governor?

A. Some time afterwards.

Q. After you returned from New York?

A. Yes.

Q. When you went to New York, and while there, who be

162 came purchaser, if anyone, of this twenty five thousand dolla bond issue?

A. The Planters Bank purchased them. We carried them fo awhile and afterwards sold them to Major Millsaps at Jackson. Afte

that I think he carried them along several years, until they were due and then they were refunded at a lower rate of interest.

Q. Do you recall anything about a new issue of bonds to take up the old issue?

A. There was a new issue after these others became due. They ran along for several years before they were due.

Q. *Do* what extent, if at all, were these bonds bought by you as the then cashier, I believe you were, of the Planters Bank from R. T. Wilson & Company and the Pacific Improvement Company? To what extent was the City of Clarksdale interested in that purchase; in other words, was it done for them or for the bank?

A. The bank bought them for themselves, as they were very much interested in the town and the citizens said they would see that they didn't lose anything on them.

Q. How did the Bank view the bonds, as being good, bad or indifferent?

A. We viewed it as a first class investment, as it stood all the tests in all the Courts and we decided we would not run any risk.

Q. What binding legal obligation, or any obligation, did you as representative of the Planters Bank have with the town or City of Clarksdale to resell the bonds to the Town or City?

A. Well, we told them that if they wanted to take them up, we would not charge them anything for our services, except just actual expenses up there, and all the citizens said that they would see that we didn't lose anything on them.

Q. And you afterwards did that, after the town reorganized?

A. No, we just kept the bonds. We never did anything one way or the other, except just turn over to the town the cancelled coupons.

163 Judge Minor: By cancelled coupons, you mean past due?

A. Yes sir. I think the City assumed the bonds. It was so long ago I don't remember how it was.

Mr. Scott: During the time the Planters Bank had possession of the bonds, what interest if any did the town or city of Clarksdale have in the bonds—were they owned by the Bank?

A. They were owned by the Bank.

Q. You mean to say that the only interest the town had was to pay them when they were due?

A. Yes sir.

Q. Mr. Holland, as President of the Planters Bank, you executed a certain paper on the 24th day of March, 1917, which has been offered in evidence by the complainant in this case, which paper I now hand you for identification. That is your signature, I presume?

A. Yes sir.

Q. In the first paragraph of this paper, Mr. Holland, I find this language: "Whereas, we the undersigned Planters Bank of Clarksdale, acting as agent for the said city or town of Clarksdale, Mississippi, on or about the 30th day of June, 1898, settled by payment in full all claims by the Pacific Improvement Company, R. T. Wilson

& Company and L. N. O. & T. Railway Company." You have just said that in making that settlement you were not acting for the city or town of Clarksdale, Miss., but that you had been appointed, together with Messrs. J. W. Cutrer and E. L. Anderson as a committee to go to New York for the purpose of making this settlement, by certain citizens and tax payers of Clarksdale, and that in buying the bonds referred to by you, and referred to in this paper which I hold in my hand, you acted for the Planters Bank and bought the bonds for the Planters Bank. I wish you would explain to the Court how you happened to make that recital—inadvertence, or how you happened to make it.

164 A. Well, Mr. Fitzgerald came over one day and said he was attorney for the City and asked us about some stock in the Railroad, if we had any claim on it, and we didn't, would we mind giving it to the city, and we told him we didn't have any claim on it, and he said he wanted to prepare some papers for us to sign and assign any interest we had to the city. While I said we represented the city, of course, we didn't have any city here then. There was just the city and we were one of the citizens—there was no city of Clarksdale until a while afterwards—until they reorganized.

Q. Your attention was not called to or attracted by that recital?

A. No, if we had any of the stock, *of* benefits accruing to the stock, we wanted to assign it to the city and give them the benefit of it.

Q. When you were in New York with the committee composed of yourself, Messrs. Cutrer and Anderson, and effecting this settlement, what if anything was said or done by you or the committee with reference to the stock certificate or the stock which had been owned by the city of Clarksdale in the old Louisville, New Orleans & Texas Railway Co.?

A. It was never mentioned, so far as I know.

Q. Well, what, if any, settlement was made by your committee at that or any other time regarding that stock?

A. It was not taken into consideration at all.

Q. Mr. Holland, in making this settlement and purchase of the bonds by you for the Planters Bank, from the Pacific Improvement Company and R. T. Wilson & Company, how much did you pay?

A. Twenty five thousand dollars.

Q. State whether or not that was the face value of the bonds.

A. Yes. It was the face value of the bonds and they agreed to cancel all the coupons to that date—the past due coupons.

Q. Do you recall about how much that amounted to?

165 Complainant objects.

A. I don't remember whether the town ever paid any of the coupons or not. I know there was a lot of them on there.

Cross-examination.

By Mr. Fitzgerald, of Maynard & Fitzgerald:

Q. Are you personally a stock holder in the Illinois Central Railroad Co.?

A. Yes.

Q. Do you own any stock in the Yazoo & Mississippi Valley R. R. Co.?

A. Well, if a share stands in my name they put it there so I could serve as a director.

Q. You are a director of the Y. & M. V. R. R. Co.?

A. Yes.

Q. Who owns a majority of the stock of the Y. & M. V. R. R. Co.?

A. I don't know.

Q. Do you know a Company known as the Mississippi Valley Company?

A. No.

Q. Have you ever met in the directorship of the Y. & M. V. R. R. Co.?

A. Yes.

Q. Do you know whether or not there is present at those meetings representing the majority of the stock holders some person representing the Mississippi Valley Company?

A. I don't know.

Q. You are not acquainted with the intricacies of that corporation?

A. No sir.

Q. Speaking about this stock in the L. N. O. & T. Ry. Co., that belonged to Clarksdale at one time, when you made your settlement in New York, you didn't know anything about the stock that had been issued to the city?

A. I don't remember whether I knew it before or after.

166 Q. You don't know who then owned it?

A. No.

Q. In making your settlement with the Pacific Improvement Company there, you simply bought the bonds from them for the Planters Bank?

A. Yes.

Q. At the sam- time, Mr. Holland, you did act in your opinion, as trustee for the city of Clarksdale in settling this matter?

A. Yes, they all met here and as I remember it, said they would see it was paid and protect us.

Q. And you felt you were acting for the city whether you——

Mr. Scott: We object to leading the witness, or as to what the witness felt.

By the Court: Go ahead.

(Counsel excepts.)

Q. You felt at that time, while you didn't know the legal status, that you were acting as a representative of the city and citizens?

A. Yes, we felt like the citizens would take care of us after they had reorganized.

Q. Then you didn't make any settlement with the Pacific Improvement Company in regard to any stock in the railroad at all—you simply bought the bonds and paid them what they agreed to take for them?

A. Yes.

Q. And in that agreement you made certain agreements in regard to expenses and costs?

A. Yes sir.

Q. Now, therefore, in making this agreement in which you say you were acting for the city of Clarksdale, you made it under the same impression that you are now, that you were acting in that capacity, whatever the legal situation may have been?

A. Yes, we felt that the citizens would assume the bonds and take care of them, however, we felt like we had good security anyway.

Q. In other words, you were not trying to give up any-
167 thing that the city might have, but simply trying to procure these bonds for the benefit of the city and didn't intend to make any agreement whereby you waived any of the city's rights at all?

A. The citizens' rights?

Q. Any of the city's rights.

A. Oh, no. We didn't make any agreement of that kind.

Q. Do you remember a citizen of Clarksdale named W. D. Chapman?

A. Yes.

Q. Do you remember an institution here in Clarksdale that subsequently "broke," in common parlance, called the Clarksdale Bank & Trust Company?

A. Yes.

Q. Who was the Receiver of that Company?

A. W. D. Chapman.

Q. Where did he live?

A. In Clarksdale.

Mr. Scott: When you bought th-se bonds about which Mr. Fitzgerald has inquired and I have inquired, for the Planters Bank, were you then representing th- Bank, or were you representing anybody else?

Mr. Fitzgerald: May it please the court, we think the witness has stated in his original and cross-examination, and stated fully and clearly his position.

By the Court: Let him state it again.

A. Of course, we were representing the Bank. The Bank bought them so that they could reorganize the city, expected the city to protect them and assume the bonds after they reorganized. Of course, we had to take a chance and we did it and took that chance.

Complainant rests.

Defendant rests.

168 Mr. Fitzgerald: Now comes the complainant and moves the court that the defendant be compelled by order of this Court to designate the sale or levy under which they claim the ownership of the stock, share or interest of the City of Clarksdale in and to the Louisville, New Orleans & Texas Railway Company, or the

consolidated company, the Yazoo & Mississippi Valley Railroad Company. I will let that go over until such time as your honor cares to rule on it.

By the Court: All right.

Judge Minor: I wish to emphasize to your honor, that in this case, the defendants invoke and instist upon the provisions of the United States sta-utes, to wit; the Act of 1872, generally known as the Conformity Act, and being Section 916 of the Revised Statutes; the Act of March 3, 1893 entitled an Act to Regulate The Manner in which Propert- Shall be Sold Under Orders and Decrees of any United States Court, same being 27th United States Sta-ute at Large, 751, and that defendants also rely upon the judgment rendered by the United States Circuit Court for the Western Division of the Northern District of Mississippi, sitting at Oxford, Mississippi, rendered in the case of Pacific Improvement Company against the City or Town of Clarksdale, being No. 3960 of the law side of said court and upon executions issued under and in pursuance of said judgment.

Comes the defendants, the Yazoo & Mississippi Valley Railroad Company and waive the right to any relief under the cross bill herein, being advised that a judgment dismissing the bill will afford all the relief that is desired.

Case closed.

168*a*

2006.

CITY OF CLARKSDALE

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

I hereby certify that the foregoing 61 pages is a true and correct transcript of my notes of the testimony taken in the above styled case. I have this day delivered in person to Y. E. Howell, Chancery Clerk of the Second Judicial District of Coahoma County, at Clarksdale, Mississippi, and so notified the following attorneys by mail; Maynard & Fitzgerald, Clarksdale, Miss., Mr. H. D. Minor, Memphis, Tenn., Scott & Yerger, Clarksdale, Miss.

This the 27th day of May, 1918.

L. L. GOINGS,
Official Court Stenographer,
Seventh Chancery Court District.

169 No. 2006.

CITY OF CLARKSDALE, Complainant,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and MISSISSIPPI VALLEY COMPANY, Defendants.

This cause coming on this day to be heard on the original bill of the City of Clarksdale, the answer thereto and cross bill of the Yazoo & Mississippi Valley Railroad Company, the answer to the said cross bill, and the amended bill of the said City of Clarksdale, and the answer thereto by the Mississippi Valley Company, and also upon full proof and evidence, both documentary oral and of record and upon all exhibits; and the Court having heard the argument of counsel of all the parties and having maturely considered the same, and the whole cause, and being fully advised in the premises, doth order, adjudge and decree as follows, to wit:

First. That on April 29th, 1891 the city of Clarksdale, for a good and valid consideration, purchased from the Louisville, New Orleans & Texas Railway Company a share, stock or interest in said Company and received from the said Louisville, New Orleans & Texas Ry. Company, its stock certificate No. 147 for 250 shares of the Louisville, New Orleans & Texas Ry. Co., which shares were of the par value of $100.00 each.

Second. That *upon*, the city of Clarksdale became the owner and was possessed of, for good and valid consideration, of a certain share, stock, or interest in and to the corporation known as the Louisville, New Orleans & Texas Ry. Co., as aforesaid, which share, stock or interest of the said City of Clarksdale was in the proportion which the number of shares, to wit; 250 shares of the par value of $100.00 each, owned by said city as aforesaid, bore to the whole number of shares of the stock theretofore issued by the said Louisville, New Orleans & Texas Ry. Co.

Third. It is further ordered, adjudged and decreed that the Louisville New Orleans & Texas Railway Co., and the Yazoo & Mississippi Valley Railroad Co. on the 24th day of October, 1892 by virtue of the laws of the state of Mississippi, and by virtue of certain articles of consolidation, became, and were consolidated into one cor-
170 poration, known as the Yazoo & Mississippi Valley Railroad Company, one of the defendants in this cause.

Fourth. It is further ordered, adjudged and decreed that the city or town of Clarksdale, by virtue of the laws of the State of Mississippi, and *if* the said articles of consolidation upon the completion of the said consolidation on the 24th day of October, 1892, as the then owner of the said 250 shares of stock in the Louisville, New Orleans & Texas Railway Company became, and was possessed of a certain stock, share or interest in the consolidated company known as the Yazoo & Mississippi Valley Railroad Company, defendant hereto, and the said stock, share or interest owned by the said city of Clarks-

dale in said consolidated Yazoo & Mississippi Valley R. R. Co., was in proportion, which the said 250 shares of stock owned by the city of Clarksdale, as aforesaid, in the Louisville, New Orleans & Texas Ry. Co. bore, at the date of said consolidation, to the whole number of shares of stock theretofore issued by both said companies, the Louisville, New Orleans & Texas Ry. Co., and the Yazoo & Mississippi Valley Railroad Company.

Fifth. It is further ordered, adjudged and decreed that the city of Clarksdale is now, and has ever been since the date of the consolidation aforesaid between the Louisville, New Orleans & Texas Railray Company and the Yazoo & Mississippi Valley Railroad Company the true, legal and equitable owner of the said stock, share or interest in said consolidated company, the Yazoo & Mississippi Valley Railroad Company, and is now entitled to have issued to it the said City of Clarksdale by the said consolidated company, the Yazoo & Mississippi Valley Railroad Company, a stock certificate, or indi/ia of ownership of the said city of Clarksdale, of the number of its shares of stock in the said consolidated Yazoo & Mississippi Valley Railroad Company, and the said city or town of Clarksdale is entitled to all the rights, privileges, immunities, interests and ownership, and participation in the corporation as consolidated and known as the Yazoo & Mississippi Valley Railroad Company, aforesaid, as other stockholders are entitled to, in proportion to the number of shares of stock owned by it as aforesaid.

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Sixth. It is further ordered, adjudged and decreed that the defendant hereto, the Mississippi Valley Company, has no claim, right or interest in, either legal or equitably, to the share, stock, or interest originally owned and still owned, by the city of Clarksdale in either the Louisville, New Orleans & Texas Railway Co., or the consolidated Yazoo & Mississippi Valley Railroad Company, the other defendant hereto, nor has it, the said Mississippi Valley Company, any right, title, claim or interest in and to the original stock certificate, or indi/ia or ownership of the city of Clarksdale of its share, or interest in the Louisville, New Orleans & Texas Railway Company, being the original certificate of stock No. 147 of the Louisville, New Orleans & Texas Railway Company, for 250 shares of stock of the par value of $100,00 each, issued to the city of Clarksdale, April 29th, 1891 as set forth in the pleadings of this cause.

Seventh. It is further ordered, adjudged and decreed, that all rights, title and claim, both legal and equitable, set up herein by either the Mississippi Valley Company, defendants hereto, or the Yazoo & Mississippi Valley R. R. Co., also defendants in and to the stock, shares, and interest of the City of Clarksdale in the consolidated Yazoo & Mississippi Valley Railroad Company, be and the same is hereby cancelled as a cloud upon the title of the said City of Clarksdale, and declared to be null, void and of no effect, and all right, title, claim and interest set up herein by either of said defendants, to the stock certificate or indi/ia of ownership of the city of Clarksdale, Miss., herein referred to as stock certificate No. 147 for 250 shares of Louisville, New Orleans & Texas Railway Company of the par value of $100,00 each be and the same is hereby cancelled

and declared as null, void and of no effect, and the said Mississipp
Valley Company, defendant, be and is hereby directed and ordere
to deliver to the city of Clarksdale, the said original stock certificat
No. 147, as aforesaid, calling for the said 250 shares of stoc
172 of the Louisville, New Orleans & Texas Railway Company
the par value of $100.00 each.

Eighth. It is further ordered, adjudged and decreed, that th
Yazoo & Mississippi Valley Railroad Company, defendant hereto h
and it is hereby ordered and directed, to issue to the City of Clark
dale, a stock certificate *of* indi*t*ia of ownership of the share, stock o
interest in the said Yazoo & Mississippi Valley Railroad Co., whic
stock certificate shall for- and be the indi*t*ia of ownership of the cit
of Clarksdale of 250 shares of stock of the corporation known as th
Yazoo & Mississippi Valley Company, defendant hereto, of the pa
value of $100.00 each, as provided for by the articles of consolida
tion between the Louisville, New Orleans & Texas Railway Company
and the Yazoo & Mississippi Valley Railroad Company, consum
mated and completed October 24th, 1892 and the said Yazoo & Mi
sissippi Valley Railroad Company is further hereby ordered and di
rected to admit the said city of Clarksdale as a stock holder in th
said corporation, the Yazoo & Mississippi Valley Railroad Company
and to admit the said city to participation in said corporation, in
proportion to the number of its shares of stock as all other stock
holders of the said corporation.

Ninth. It is further ordered, adjudged and decreed, that the City
of Clarksdale, having been the owner of the said stock, share or in
terest in the said Yazoo & Mississippi Valley Railroad Company
since its inception, is entitled to a full and complete accounting of
all the acts and things done, and of the corporate property, dividends
and emoluments, which may be due the said city of Clarksdale as
owner of the said stock, share or interest in said railroad Company
the Yazoo & Mississippi Valley Railroad Company. And for this
purpose, Y. E. Howell, of Clarksdale, Mississippi, is hereby ap
pointed as Special Master and Commissioner of this Court to take
and state an account between the said city of Clarksdale and the
said Yazoo & Mississippi Valley Railroad Company defendant hereto,
and the said Mississippi Valley Company, defendant hereto, with
full and complete and all the usual powers accorded Commis
173 sioners in Chancery and the said Commissioners *is* hereby au
thorized and directed to take evidence, both oral and docu
mentary, and upon the stating of said account to report to this Court
thereon.

And the Yazoo & Mississippi Valley Railroad Company and the
Mississippi Valley Company defendants hereto, both objecting and
protesting to this decree, and excepting hereto, do now appear in
open court and pray for an appeal from this decree to the Supreme
Court of the State of Mississippi, and an appeal which — operate as a super
sedeas is hereupon *according* accordingly granted both said defendant
upon their entering into a good and sufficient bond to be approved by the
Clerk of this Court in the penal sum of $500.00, payable accordin

to law, and ninety days be given the said defendants for the perfection of said appeal.

Ordered, adjudged and decreed, this the 20th day of April, 1918.

JOE MAY, *Chancellor.*

The above decree appears of record in Minute Book 5, Page 129, of the Minutes of the Chancery Court Second District of Coahoma County, Mississippi.

174 STATE OF MISSISSIPPI,
County of Coahoma:

In the Chancery Court, Second District.

CITY OF CLARKSDALE
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Know all men by these presents, that we, the Yazoo & Mississippi Valley Railroad Company, as principal, and D. A. Scott and E. M. Yerger, as sureties, are held and firmly bound unto the City of Clarksdale in the penal sum of Five Hundred Dollars ($500.00) for the payment of which, well and truly to be made, we and each of us bind ourselves, successors, heirs and personal representatives, jointly and severally, firmly by these presents.

Witness our signatures this the 24th day of June, 1918.

The condition of the above obligation is such that whereas, heretofore, to wit: a decree was made and entered in the above styled cause by the Court aforesaid, in favor of the complainant therein, the City of Clarksdale, and against the said principal obligator, the said Yazoo & Mississippi Valley Railroad Company, that said Yazoo & Mississippi Valley Railroad Company feeling aggrieved thereat, applied for and obtained an appeal ther-from to the Supreme Court of Mississippi, without supersedeas. Now, therefore, if the said Yazoo & Mississippi Valley Railroad Company shall well and truly pay all costs, which may be awarded against it by the said Supreme Court of the State of Mississippi in the said above styled cause, then this obligation shall be and become void, otherwise to remain in full force and effect.

YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By D. A. SCOTT,
Agent and Attorney in Fact of Record.
D. A. SCOTT.
E. M. YERGER.

175 STATE OF MISSISSIPPI,
Coahoma County:

I, Y. E. Howell, Clerk of the Chancery Court in and for said County and State, do hereby certify that the foregoing 184 pages

contain a *while*, true and correct transcript of all the papers and pr
ceedings as the same appear on file and of record in my office, in t
cause styled on the docket of the Chancery Court, Second Distri
said County and State, City of Clarksdale vs. Yazoo & Mississip
Valley Railroad Company, No. 2006.

Witness my hand and official seal, this the 27th day of Augu
A. D. 1918.

(Signed) Y. E. HOWELL,
Clerk of the Chancery Court of
Coahoma County, Miss.

176 In the Supreme Court of Mississippi.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and TH
MISSISSIPPI VALLEY CO., Appellants,

vs.

CITY OF CLARKSDALE.

On Appeal from Chancery Court of Coahoma County.

In this cause comes the appellants and make and file the following

Assignment of Errors.

The Court below erred:

I.

In granting the appellee's prayer for relief and in granting th
appellee any relief whatever.

II.

In overruling the Motion of appellants made when appellees firs
announced its case closed, and in not then dismissing the bill.

III.

In overruling the Motion of appellants to dismiss the bill, mad
at the conclusion of appellee's evidence, and in not then dismissing
appellee's bill for that no sufficient evidence to sustain the bill ha
been adduced by appellee; and for that on the evidence introduce
by appellee it was not entitled to any relief.

IV.

In holding and adjudging that the sale by the United States Mar
shal, A. J. Cooke, on December 6, 1897, at Oxford, Miss., under an
pursuant to a fi. fa. and duplicate fi. fa., duly issued under a vali

judgment in favor of the Pacific Improvement Company and against the City of Clarksdale made and entered in the case of Pacific Improvement Co. v. City or Town of Clarksdale, No. 647, in the Circuit Court of the United States in the Western Division for the Northern District of Mississippi, a Court having jurisdiction of the parties and of the subject matter, at which sale the certificate of stock here in controversy and the interest represented thereby
177 was sold by said Marshal to the Pacific Improvement Co. for the sum of $100.00 pursuant to which sale the said Marshal delivered the said Certificate of Stock representing 250 shares of stock of the par value of $100.00 per share in the Louisiana, New Orleans & Texas Railway Company, a corporation of Mississippi was void; and in refusing to hold and adjudge that said sale was valid and that thereby the said Pacific Improvement Company became the true and lawful owner of the said certificate of stock and the interest represented thereby.

V.

In refusing to hold and adjudge that the validity of the execution sale aforementioned was a question to be determined by the Federal Law and that the validity vel non of said sale was a Federal question; and in holding and adjudging that said question was one to be determined by the Laws of Mississippi.

VI.

In refusing to hold and adjudge that the law governing the sale under said execution was the Act of Congress of March 3, 1893, 27 Stat. L. 720, and in holding and adjudging that the law applicable was the law of Mississippi.

VII.

In refusing to hold and adjudge that whether the said Act of Congress or the laws of Mississippi governed the said sale under said execution, the validity vel non of said execution was a Federal question, for that even if the statutes of the State were applicable the same became Federal statutes by adoption under the Act of Congress of June 1, 1872, U. S. Revised Stat. Sec. 916.

VIII.

In refusing to hold and adjudge that the applicable law governing sales under execution, whether State or Federal, with respect to the place of sale and the advertisement thereof were directory merely, and in holding and adjudging that the same were mandatory and that a failure strictly to comply therewith under the said sale by the Marshal was void.

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IX.

In holding and adjudging that the said sale by the Marshal was absolutely void and therefore subject to collateral attack, and in refusing to hold and adjudge that the said sale was valid, and in refusing to hold and adjudge that at the most the sale was merely irregular and therefore not subject to collateral attack.

X.

In refusing to hold and adjudge that appellee's bill in this case was a collateral attack, and in holding and adjudging that same was a direct attack.

XI.

In holding and adjudging that the showing made by appellee in its proof was sufficient to entitle it to relief for that appellee made no proper showing of ownership of the stock in question at the time the bill was filed, or at the time of the trial.

XII.

In holding and adjudging that the appellee was not barred by statute of limitation, and that the statute of limitations do not run against the appellee, and in refusing to hold and adjudge that appellee was barred by the statute of limitations, specially plead in the answers of the defendants.

XIII.

In refusing to hold and adjudge that the appellee was estopped by its conduct and by its laches to assert title to the stock in question and to maintain the original bill herein.

XIV.

In refusing to hold and adjudge that the appellee's delay and long continued silence with full knowledge of the facts, and that its other conduct with respect to said stock was a bar to any right to relief under its original or amended bill herein.

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XV.

In overruling all and singular the appellant's objection to evidence made in the course of the trial.

XVI.

In admitting all and singular the testimony offered by the appellee at the trial, to which objection was made by appellants at the time.

XVII.

In refusing to hold and adjudge that under the Marshal's sale aforesaid the Pacific Improvement Company acquired a good and valid title to the certificate of stock in question, and to the interests represented thereby, and that the said certificate of stock and the interest- thereby represented passed to the appellant, the Mississippi Valley Company, by virtue of the transfer to it of said stock and interests by the Pacific Improvement Company, and that said Mississippi Valley Company is now the owner of said stock and interests; and in holding and adjudging that the appellee was the owner of said certificate of stock and the interests thereby represented.

XVIII.

In holding and adjudging that the appellee was entitled to an accounting.

XIX.

In refusing to hold and adjudge that the applicable Federal Law governing *d*ales under execution issued by a Federal Court, with respect to the place of sale and the advertisement thereof was directory merely, and in holding and adjudging that the same was mandatory and that a failure strictly to comply therewith in the said sale by the Marshal was under the applicable Federal law void.

XX.

In holdi*gn* and adjudging that the said sale by the Marshal was absolutely void and therefore subject to collateral attack, and in refusing to hold and adjudge that, under the applicable Federal law, the sale was at most irregular and therefore not subject to collateral attack.

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XXI.

In refusing to hold and adjudge that under the applicable Federal Law appellee was estopped by its conduct and by its laches to assert title to the stock in question and to maintain the original bill herein.

XXII.

In refusing to hold and adjudge that under the applicable Federal law the appellee's delay and long continued silence with full knowledge of the facts, and that its other conduct with respect to said stock were a bar to any right to relief under its original or amended bill herein.

XXIII.

And the Yazoo & Mississippi Valley Railroad Company also further assigns as error the action and judgment of the Court below:

(*a.*) In requiring The Yazoo & Mississippi Valley Railroad Company to treat both the City of Clarksdale and The Mississippi Valley Company as stockholders of the 250 shares of stock in the said Railroad Company.

(*b.*) In not requiring the cancellation of the certificate of stock which was issued to the Mississippi Valley Company in exchange for the original certificate of stock issued to the City of Clarksdale involved in the present suit.

(*c.*) In permitting a collateral attack to be made by the City of Clarksdale upon the validity of the execution made under the judgment against the said City in the Federal Court.

(*d.*) In taking jurisdiction of a matter of which the Federal Court had and retained prior jurisdiction.

(*e.*) In granting relief in the present suit before the City of Clarksdale had exhausted its remedy in the action at law in the Federal Court in which judgment had been recovered against the said city.

(*f.*) In requiring by the decree below, a reissue of stock and an over issue of stock by 250 shares.

H. D. MINOR,
CHAS. N. BURCH,
D. A. SCOTT,
Solicitors for Appellants.

BLEWETT LEE,
Of Counsel.

I certify that I delivered this day a copy of the foregoing assignments of error to Messrs. Maynard & Fitz Gerald, Clarksdale, Miss., counsel for appellee.

D. A. SCOTT, *Attorney.*

181 Clarksdale, Miss., Oct. 4, 1918.

Endorsed: Received and filed Oct. 7, 1918. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

Final Decree.

In the Supreme Court of the State of Mississippi, March Term, 1919, March 31st, 1919.

20542.

YAZOO & MISSISSIPPI VALLEY R. R. COMPANY

v.

CITY OF CLARKSDALE.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Coahoma County, 2nd Dist. and this Court having sufficiently examined and con-

sidered the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 20th day of April 1918 be and the same is hereby affirmed, and that appellee do have and recover of appellant and D. A. Scott and E. M. Yerger, sureties in the appeal bond, the costs of this cause in this Court and in the Court below, to be taxed, &c.

182 STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, being the Court of said State which has highest, last, and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full true and correct copies of the papers, each and all of them constituting the record in said Supreme Court in the case of The Yazoo & Mississippi Valley Railroad Company vs. The City of Clarksdale No. 20542 on the docket of said Court, as the same appear of record on file in my office.

Given under my hand with the seal of said Court affixed at office in the City of Jackson, Mississippi, this the 21st day of April A. D. 1919.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

183 In the Supreme Court of Mississippi.

No. 20542.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et als.

vs.

CITY OF CLARKSDALE.

Petition for Writ of Error from United States Supreme Court to the Supreme Court of Mississippi.

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi:

The Yazoo & Mississippi Valley Railroad Company, the Mississippi Valley Company, D. A. Scott and E. M. Yerger, petitioners, present this their petition for a writ of error from the Supreme Court of the United States in the above entitled cause and respectfully show that on March 31, 1919, the Supreme Court of Mississippi rendered a final decree in said cause in favor of the City of Clarksdale and against The Yazoo & Mississippi Valley Railroad Company and the Mississippi Valley Company, appellants therein, and also against pe-

titioners, D. A. Scott and E. M. Yerger, sureties on the appeal bond, whereby the said cause was appealed from the Chancery Court of Coahoma County, Mississippi, that being the court of original jurisdiction, and by its final judgment the Supreme Court of Mississippi awarded execution against all of your petitioners in this cause for the costs of the cause and also affirmed the decree of the said Chancery Court of Coahoma County, Mississippi wherein and
184 whereby it was finally adjudged and decreed that the City of Clarksdale was the true owner of certain shares of the capital stock of the said Railroad Company, to-wit, 250 shares of the par value of $100.00 per share, and the claim of the said Mississippi Valley Company to said stock was cancelled and declared to be for naught held, and the said Railroad Company was ordered to treat the said City of Clarksdale as a holder of its capital stock to the extent of said 250 shares and further that the said City of Clarksdale was entitled to an accounting as against the said Railroad Company and the Mississippi Valley Company, and a reference to a commissioner was ordered for the purpose of taking and stating said account.

Final decree was rendered in the said cause by the Supreme Court of Mississippi, as aforesaid, on March 31, 1919, ordering, adjudging and decreeing that the said decree of the Chancery Court of Coahoma County be in all respects affirmed and that the City recover of the appellants and the sureties on their appeal bond the costs of the cause.

Your petitioners claim the right to remove said case to the Supreme Court of the United States by writ of error because in said final decree in the Supreme Court of Mississippi there was drawn in question the validity of an authority exercised under the United States, and the decision of the said Supreme Court of Mississippi was against the validity of such authority. That is to say, the said Mississippi Valley Company was the owner and holder of said 250 shares of stock by virtue of the sale of the same by the United
185 States Marshal for the Northern District of Mississippi under an execution from the Circuit Court of the United States for the Northern District of Mississippi, pursuant to a judgment rendered against the City of Clarksdale in June, 1897 by the said Circuit Court of the United States, sitting at Oxford, Mississippi, and by virtue of the transfer of said stock (pursuant to said sale) by the said Marshal in writing on the back of the stock certificate, whereby the stock was transferred and delivered to said Mississippi Valley Company's vendor, the Pacific Improvement Company, the purchaser at said execution sale.

In its decree the said Supreme Court of Mississippi denied the validity of the authority of the United States Marshal exercised as aforesaid pursuant to a judgment of the said Circuit Court of the United States and under an execution issuing out of said court upon said judgment.

The said Supreme Court of Mississippi decided against the validity of the authority of the said Marshal exercised under the United States, as aforesaid, in failing to reverse the decree of the Chancery

Court of Coahoma County, Mississippi and in failing and refusing to dismiss the bill of the complainant therein.

Wherefore petitioners pray for an allowance of a writ of error, same to operate as a supersedeas, returnable to the Supreme Court of the United States and for citation, specially presenting herewith an assignment of errors to be presented and urged in the Supreme Court of the United States, and as in duty bound petitioners
186 will ever pray, etc.

May 23, 1919.

THE YAZOO & MISSISSIPPI VALLEY R. R. CO.,
MISSISSIPPI VALLEY COMPANY,
D. A. SCOTT, AND
E. M. YERGER,
Petitioners,
By H. D. MINOR,
CHAS. N. BURCH,
Their Attorneys.

Let the writ of error, same to operate as a supersedeas, issue as prayed for in the foregoing petition.

Given under my hand, this the 24th day of May, A. D., 1919.

SYDNEY SMITH,
Chief Justice of Supreme Court of Mississippi.

Filed May 24/1919.
GEO. C. MYERS, *Clerk.*

187 In the Supreme Court of Mississippi.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et als.

vs.

CITY OF CLARKSDALE.

Bond.

Know all men by these presents: that we, The Yazoo & Mississippi Valley Railroad Company, the Mississippi Valley Company, D. A. Scott and E. M. Yerger, as principals, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the City of Clarksdale in the penal sum of One Thousand Dollars ($1000.00) for the payment of which well and truly to be made we bind ourselves, our successors, heirs, personal representatives and assigns firmly by these presents.

Sealed with our seals and dated this the 23rd day of May, 1919.

The condition of this obligation is such that, whereas the above bound principals have prosecuted a writ of error from the Supreme Court of the United States to reverse a judgment rendered by the Supreme Court of Mississippi in the above cause, same being No.

20,542 on the docket of said court, wherein the said Yazoo & Mississippi Valley Railroad Company and the Mississippi Valley Company were the appellants and the said D. A. Scott and E. M.
188 Yerger were the sureties on the appeal bond by which the case was carried from the state court of original jurisdiction, to-wit, the Chancery Court of Coahoma County, Mississippi, to the Supreme Court of Mississippi, and the said City of Clarksdale was the appellee; the decree was rendered against all of said principals for the costs of said cause and against the first two of said principals in other respects.

Now, if the above named principals, plaintiffs in the said writ of error, shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise it shall remain in full force and effect.

THE YAZOO & MISSISSIPPI VALLEY R. R. CO., [SEAL.]

MISSISSIPPI VALLEY COMPANY, [SEAL.]

D. A. SCOTT, AND

E. M. YERGER, [SEAL.]

By H. D. MINOR,
Their Attorney in Fact.

[Seal the United States Fidelity & Guaranty Company, Incorporated 1896.]

UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.,

By L. N. JULIENNE,
Atty. in Fact.

H. V. WATKINS,
Atty. in Fact.

The foregoing bond and surety thereon are approved this 24th day of May, 1919.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

[Endorsed:] Y. & M. V. R. R. Co. et al. v. City of Clarksdale. Bond. Filed May 24, 1919. Geo. C. Myers, Clerk.

189 In the Supreme Court of the United States.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et als., Plaintiffs in Error,

vs.

CITY OF CLARKSDALE, Defendant in Error.

On Writ of Error to the Supreme Court of Mississippi.

Assignment of Errors.

The plaintiffs in error, The Yazoo & Mississippi Valley Railroad Company, the Mississippi Valley Company, and D. A. Scott and E. M. Yerger, the sureties on their appeal bond, also plaintiffs in error, respectfully show to the court that there are manifest errors prejudicial to them apparent of record in the proceedings, decisions and final decree of the Supreme Court of Mississippi in the above entitled cause, for that the Supreme Court of Mississippi erred:

1. In holding and adjudging that the sale by the United States Marshal, A. J. Cooke, on December 6, 1897, at Oxford, Mississippi, under and pursuant to a fi. fa. and duplicate fi. fa. duly issued under a valid judgment in favor of the Pacific Improvement Company and against the City of Clarksdale made and entered in the case of Pacific Improvement Company v. City of Clarksdale, No. 647 in the Circuit Court of the United States for the Northern District of Mississippi sitting at Oxford, a court having jurisdiction of the parties and of the subject matter, at which sale the certificate of stock
190 and the stock here in controversy and the interest represented thereby was sold by said Marshal to the Pacific Improvement Company (the vendor of plaintiff in error, the Mississippi Valley Company), pursuant to which sale the said Marshal indorsed on the back of the certificate representing said stock a transfer and assignment thereof to the Pacific Improvement Company and delivered said certificate, representing 250 shares of the stock (par value $100.00 per share) in the Louisville, New Orleans & Texas Railway Company, a corporation of Mississippi (afterwards consolidated with and into the Yazoo & Mississippi Valley Railroad Company, plaintiff in error) was void; and in refusing to hold and adjudge that said sale was valid and that thereby the Pacific Improvement Company became the true and lawful owner of the said certificate of stock and the interest represented thereby, which certificate and interest thereafter passed to plaintiff in error, the Mississippi Valley Company, by a written assignment and transfer thereof by said Pacific Improvement Company, for a valuable consideration.

2. In refusing to hold and adjudge that the validity of the execution sale aforementioned was to be determined by the federal law and that the validity vel non of said sale was a federal question; and in holding and adjudging that said question was one to be determined by the laws of Mississippi.

3. In refusing to hold and adjudge that the law governing the place of sale under said execution was the Act of Congress of
191 March 3, 1893, 27 Stat. L., 720, and in holding and adjudging that the applicable law was the law of Mississippi.

4. In refusing to hold and adjudge that under the applicable law, to-wit, the Act of Congress of March 3, 1893, 27 Stat. L. 720, the provisions with respect to the place of sale under execution and the advertisement thereof were directory merely, and in holding and adjudging that the same were mandatory and that a failure to comply strictly therewith rendered the said sale and transfer by the said Marshal void.

5. In holding and adjudging that the said execution sale by the Marshal was absolutely void and therefore subject to collateral attack and in refusing to hold and adjudge that the said sale was valid, and in refusing to hold and adjudge that, at the most, the sale under execution at the door of the United States Court House instead of at the Court House in the County was a mere irregularity which would not subject the sale to a collateral attack.

6. In refusing to hold and adjudge that under the execution sale by the Marshal, as aforesaid, and the indorsement and delivery of the stock certificate thereafter by the Marshal pursuant thereto, the Pacific Improvement Company acquired a good and valid title to the stock in question, and to the interests represented thereby, and that the said certificate of stock and the interest thereby represented thereafter passed to the plaintiff in error, the Mississippi Vally Company, by virtue of the transfer to it of the said stock by the Pacific
192 Improvement Company, and in holding and adjudging that the defendant in error, the City of Clarksdale, is now the owner of said certificate and of the interests represented thereby.

7. In holding and adjudging that the defendant in error, the City of Clarksdale, made a sufficiently clear proof of its ownership of the stock in question to entitle it to maintain this bill.

8. In holding and adjudging that the defendant in error, the City of Clarksdale, was not estopped by its conduct or by its laches to assert title in a court of equity to the stock in question and to maintain its original bill herein.

9. In holding and adjudging that the defendant in error's right to maintain this bill was not precluded by the rule that he who comes into equity must do so with clean hands.

10. In holding and adjudging that the defendant in error's delay and long continued silence, to-wit, nearly twenty years, with full knowledge of the facts, together with its other conduct in respect of said stock was not a bar to relief under the original and amended bill herein.

11. In holding and adjudging that the said sale by the Marshal was absolutely void and therefore subject to collateral attack and in sustaining a collateral attack thereon, and refusing to hold and adjudge that, under the applicable federal law, the sale was, at most, irregular and therefore not subject to collateral attack.

12. In refusing to hold and adjudge that the applicable federal

law governing a sale under execution issuing from a federal court with respect to place of sale and advertisement thereof, was
193 directory merely, and in holding and adjudging that a failure strictly to comply therewith in the said sale by the Marshal, rendered said sale void.

13. In refusing to hold and adjudge that, under the applicable federal law, defendant in error's delay and long continued silence with full knowledge of the facts, and its failure to exercise its remedies in the court from which said execution issued, together with its other conduct in respect of said stock, were a bar to any right to relief under its original and amended bill herein.

14. In granting relief in the present suit when the City of Clarksdale had not exhausted its remedy by proper proceedings in the Federal Court in which the judgment had been recovered against the City pursuant to which judgment the execution sale was had.

15. In taking jurisdiction and exercising same of a matter of which the federal court, to-wit, the District Court of the United States for the Western Division of the Northern District of Mississippi, sitting at Oxford, had and retained prior jurisdiction.

16. In refusing to hold and adjudge that in this case, where the rights of plaintiffs in error depend upon and are derived from an execution sale by a United States Marshal, under and pursuant to a judgment of a United States Circuit Court, and the defendant in error, by bill in equity, seeks to cancel and annul these rights as a cloud on its title, the rules of equity with respect to laches and equitable estoppel as applied by the Federal courts are controlling;
194 and in applying to said case, instead, the equitable rules of the Mississippi state court.

17. And the defendant in error, The Yazoo & Mississippi Valley Railroad Company further assigns as error that the Supreme Court of Mississippi erred:

(*a*) In requiring it, The Yazoo & Mississippi Valley Railroad Company, by the final decree in said cause, to treat both the City of Clarksdale and the Mississippi Valley Company as stockholders of the stock in question.

(*b*) Even if the Supreme Court of Mississippi was correct in its decree as to the ownership of the stock in question, there was error in not requiring the cancellation of the certificate of stock which was issued to the Mississippi Valley Company by The Yazoo & Mississippi Valley Railroad Company, in exchange for the original certificate of stock in the Louisville, New Orleans & Texas Railway Company issued to the City originally.

(*c*) In requiring by the decree below a re-issue of stock and an over-issue of the stock to the extent of 250 shares.

(*d*) In decreeing that complainant (defendant in error) was entitled to an accounting and in ordering same to be had.

Wherefore, plaintiffs in error pray that the said decree of the Supreme Court of the State of Mississippi be reversed and that said

Supreme Court of Mississippi be directed to enter a decree in
195 favor of the plaintiffs in error, dismissing the original bill in this cause.

This the 23 day of May, 1919.

H. D. MINOR,
CHAS. N. BURCH,
Solicitors for Plaintiffs in Error.

Filed this May 24th, 1919.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

196 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of Mississippi, Greeting:

Because in the record and proceedings and also in the rendition of judgments of a plea which is in the said Supreme Court of Mississippi before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in said state between the City of Clarksdale, complainant in the court of original jurisdiction, and The Yazoo & Mississippi Valley Railroad Company and the Mississippi Valley Company, the defendants in said court, and D. A. Scott and E. M. Yerger, sureties on the appeal bond given by the said defendants to appeal said cause from the court of original jurisdiction to the Supreme Court of Mississippi, decided by the Supreme Court of Mississippi against the said Railroad Company and said Valley Company and the said sureties on its bond, wherein was drawn in question the validity of an authority exercised under the United States, to-wit: an execution sale by the United States Marshal under an execution issued in August, 1897, by the United States Circuit Court for the Northern District of Mississippi pursuant to a judgment duly rendered by said court, and the validity of the authority exercised under the United States, further, to-wit: The act of the marshal, pursuant to said execution sale, in indorsing and delivering to the purchaser at said sale (the vendor of plaintiff in error, the Mississippi Valley Company) a certificate of stock representing 250 shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, and the decision of said Supreme Court of Mississippi was against the validity of said authority; and the decision in said cause should have been in favor of the validity of said authority, and the said Supreme Court of Mississippi erred
197 in not dismissing the bill of the defendant in error as more fully appears from the assignments of error filed herein, manifest error happened to the great damage of The Yazoo & Mississippi Valley Railroad Company, the Mississippi Valley Company and of D. A. Scott and E. M. Yerger, sureties on the appeal bond, as by their complaint appears.

We being willing for the error, if any hath been, to be duly corrected and full and speedy justice done to the parties in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 24th day of May, in the year of our Lord, 1919, and of American Independence the One Hundred and Forty-third.

[Seal U. S. District Court, Southern District of Mississippi.]

JACK THOMPSON,
Clerk of the United — District Court
for the Southern District of Mississippi.

Allowed, to operate as a supersedeas, this May 24th, 1919.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

[Endorsed:] Y. & M. V. R. R. Co. et al. v. City of Clarksdale. Filed May 24, 1919. Geo. C. Myers, Clerk.

98 THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et als.,
Plaintiffs in Error,

vs.

CITY OF CLARKSDALE, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of Clarksdale or its attorneys of record, Messrs. Maynard & Fitzgerald, Clarksdale, Mississippi, Greeting:

You are hereby cited and admonished to be and appear in Washington, District of Columbia, at the Supreme Court of the United States of America to be held in the City of Washington, in the District of Columbia, within thirty (30) days from the date of this writ, pursuant to the writ of error this day filed in the Clerk's office of the Supreme Court of Mississippi, wherein the Mississippi Valley Company, The Yazoo & Mississippi Valley Railroad Company, D.

A. Scott and E. M. Yerger, are plaintiffs in error, and you are defendant in error, to show cause, if any there is, why the decree in the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this the 24th day of May, A. D., 1919, and of the Independence of the United States, the one hundred and forty-third.

Filed this May 24, 1919.

[Seal Supreme Court, State of Mississippi.]

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

199 *Waiver of Citation.*

We, Messrs. Maynard & FitzGerald, attorneys of record and in fact, for the City of Clarksdale, defendant in error, hereby enter an appearance to the above citation and waive service, hereby agreeing that this waiver by us shall have the same force and effect — if the said citation had been regularly served on the City of Clarksdale, the defendant in error, but expressly reserving unto said City all exceptions and objections to the manner, form and substance of the writ of error, as well as to the merits, and merely waiving service for the purpose of saving expense in serving citation.

Witness our signature, this the 26th day of May, A. D. 1919.

MAYNARD & FITZGERALD,
Attorneys for Defendant in Error.

Filed this May 24th, 1919.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

200 UNITED STATES OF AMERICA,
Supreme Court of Mississippi, ss:

In obedience to the command of the within and foregoing writing I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, to-wit, The Yazoo & Mississippi Valley Railroad Company, et als., plaintiffs in error vs. City of Clarksdale, de-

fendant in error, with all things concerning same, including the original citation therein.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Mississippi at my office in the City of Jackson, Mississippi, this the 24th day of May, A. D. 1919.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

Endorsed on cover: File No. 27,157. Mississippi Supreme Court. Term No. 1071. The Yazoo and Mississippi Valley Railroad Company, The Mississippi Valley Company, D. A. Scott, and E. M. Yerger, plaintiffs in error, vs. The City of Clarksdale. Filed June 5, 1919. File No. 27,157.

FILED
DEC 6 1920
JAMES D. MAHER,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET. AL.,
Plaintiffs in Error-Petitioners.

vs.

CITY OF CLARKSDALE,
Defendant in Error-Respondent.

No. [redacted]15

BRIEF AND ARGUMENT FOR PLANTIFFS IN ERROR AND PETITONERS, ON THE WHOLE CASE.

H. D. MINOR,
CHARLES N. BURCH,
Solicitors For Plaintiffs in Error and Petitioners.

LAYCOCK & ARNOLD - MEMPHIS

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IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1920.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Defendant in Error—Respondent.

vs.

CITY OF CLARKSDALE,
Defendant in error—Respondent.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR AND PETITIONERS, ON THE WHOLE CASE.

(Page references are to printed record.)

This case is here by a writ of error allowed by the Chief Justice of the Mississippi Supreme Court and by a petition for certorari addressed to this Court. At the October Term, 1919, motions to dismiss the writ of error and the petition for certiorari were overruled—all questions being referred to the argument on the merits.

THE QUESTION.

The right of an execution debtor to make a collateral attack on an execution sale of corporate stock by the marshal—the writ being regular and issued pursuant to an admittedly valid judgment of the United States Circuit Court; the sale occurring at the Federal instead of the county courthouse.

Also, whether, in any event, an attack may be made on the execution sale after failure of the defendant in the execution to pursue its remedy in the court issuing the writ and after silence and inaction with knowledge of the facts, for over 19 years—as against a subsequent purchaser for value whose notice, if any, was constructive only.

THE CASE STATED.

An original bill (pp. 1-6) by the City of Clarksdale against The Yazoo & Mississippi Valley Railroad Company only. It averred that the City was and had been since April 29, 1891, the legal owner of 250 shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, a Mississippi corporation, of the par value of $100.00 per share, evidenced by certificate No. 147 dated April 21, 1891; that this certificate had been lost or mislaid, and could not be found; that the said L. N. O. & T. Ry Co had been consolidated with the Railroad Company (the Y. & M. V. R. R. Co.) and that said stock was very valuable; that the City had applied to the Railroad Co. for recognition of its rights which had been declined. There was a prayer for special and general relief. *The bill made no attack upon the execution sale* presently to be mentioned. It did not refer in any way to that sale nor make the purchaser at the sale a party. That purchaser is not a party.

The Railroad Company filed an answer (pp. 15-25) admitting that the stock had been issued to the City, the consideration therefor being $25,000 of the bonds

of the City, but that the Mississippi Valley Company (not a railway company) was the owner of the stock by virtue of a purchase in 1904 in good faith from the Pacific Improvement Company, which had purchased the stock on December 6, 1897, *at an execution sale by the United States Marshal pursuant to a judgment against the City rendered by the United States Circuit Court for the Northern District of Mississippi at Oxford, Miss.;* that the Mississippi Valley Company had surrendered the original certificate (representing stock in the L. N. O. & T. Ry. Co.) and secured, in lieu, a certificate for an equal amount of the stock of the Railroad Company (the Y. & M. V.). Various other defenses were set up, including laches because no step was taken by the City from Dec. 6, 1897 (the date of the execution sale) until March, 1917, when the present bill was filed; estoppel because of inaction, silence and delay and a failure to exercise any remedy in the court issuing the execution; failure of plaintiff to prove perfect title; absence of clean hands; and the statute of limitations. This answer was made a cross bill (p. 24), but at the hearing any relief under the cross-bill was waived (p. 107).

The City filed an answer to the Railroad Company's cross bill (p. 30-38) and its only reference to the execution and sale was to deny in formal terms the allegations of the answer and cross bill in respect thereto (p. 36). However, by proper pleading, the City brought in the Mississippi Valley Company as a co-defendant (p. 37) and the latter company thereupon filed an answer setting forth the same facts

and defenses as the answer of the Railroad Company (pp. 38-42).

Proof was taken and there was a decree by the Chancellor granting the complainant full relief, including an accounting (pp. 108-110), *and cancelling all claims of the defendants as a cloud on the City's title to the stock.* This decree was affirmed without opinion by the Supreme Court of Mississippi, March 31, 1919 (p. 116). 81 So. Rep. 178.

JUDGMENT AND FI. FA. VALID.

The City conceded, at the hearing, the validity of the judgment under which the execution issued (p. 54) and the formal regularity of the fi. fa. is not denied.

LEVY OF EXECUTION.

The execution was levied by the marshal by seizing the certificate No. 147, representing the 250 shares of stock in question which had been issued to the City, and by notifying the home office of the corporation (pp. 56-59). The only question made by the City in this connection was (by argument and not by pleading) that a certificate of stock, being a mere indicium of ownership, was not subject to levy. The Mississippi Code of 1871 (which was the Code in effect when the Conformity Act of Congress of 1872 was passed) authorized such a levy.

Rev. Code of Miss. (1871), Sec. 849.

For the convenience of the Court, this section is set out in full, infra, p. 65.

The Mississippi Code of 1892, which was the Code in effect *at the time of the execution sale,* but which had never been adopted by the U. S. Circuit Court, provided for the levy of an execution upon corporate stock by the officer's going to the office or principal place of busisess of the corporation and there declaring that he attaches or levies upon the stock or shares of interest of the defendant therein at the suit of the plaintiff.

Mississippi Code of 1892, Sec. 3467.

PLACE OF EXECUTION SALE.

The principal, if not the sole, reliance of the City is on the proposition (made in argument and not by pleading) that the execution sale is void because made at the wrong place, for that it was made at the United States Court House in Oxford, Miss., whereas the State statute provided that execution sales must be made "at the court house of the county."

RETURNS ON EXECUTIONS.

The return of the marshal showed his proceedings under the execution and was as follows (p. 56).

> "Executed the within writ this the 13th day of August, 1897, by levying on and taking into my possession one Certificate of stock, the property of said defendant in the Louisville, New Orleans and Texas R. R., Number 147, for 250

shares, issued to the town or city of Clarksdale, Miss. Further executed on this the 6th day of December, 1897, at 12 o'clock meridian by selling said certificate of Stock No. 147 after due advertisement by posting notices in three public places for the period of 10 days as provided by law, to the highest and best bidder for cash, before the Western door of the United States Court House, and postoffice building in the town of Oxford, Miss., at which sale the Pacific Improvement Co. became the highest and best bidder, at and for the price of $100.00 and at the same time and place I executed the writ of *vendi exponas* issued to me in this cause and offered for sale all the interest which the City or Town of Clarksdale had in the Capital Stock of the Louisville, New Orleans & Texas Railway Co. or in the Yazoo & Mississippi Valley Railroad Company, offering said interest at the same time with said certificate of stock to the said Pacific Investment for the said sum of $100.00, that being the highest and best bid offered for same.
Record, p. 93.

A duplicate fi. fa. addressed to the marshal for the Southern District of Mississippi had been issued (p. 96), on which this return was (p. 99):

"Received at Jackson, August 13, 1897, and executed same day by going to the office of the Yazoo & Mississippi Valley Railroad Company in Jackson and there declaring that I attached as levied upon the stock, shares and interests of defendant therein; further by delivering to George Gordin, Agent of the said Yazoo & Mississippi Valley Railroad Company, a true copy of this writ, and demanding of him, by instru-

ment of writing delivered to him, a statement in writing under oath of the amount of the defendant's stock, the number of its shares, and extent of its interest in said railroad company."

(At that time, the consolidation of the L. N. O. & T. Ry. Co. with the Y. & M. V. R. R. Co., under the latter name, had been in effect for some years.)

EQUITABLE DEFENSES.

The origin of the whole matter was that, in 1889, when the L. N. O. & T. Ry. Co. was about to build its Tallahatchie Branch, the City, in order to have that line touch its borders, agreed to take $25,000 of the L. N. O. & T. Ry. Co. stock and pay therefor with $25,000 of its bonds. The line was built in accordance with this agreement, the bonds were issued and the exchange of bonds for stock took place in due course. These bonds passed into the hands of the Pacific Improvement Co. and R. T. Wilson & Co. The City promptly defaulted in the payment of interest and in 1894 the bondholders brought suit against the City in the U. S. Circuit Court at Oxford, Miss., to recover on past due interest coupons. After a prolonged litigation, the case twice going to the Circuit Court of Appeals (74 Fed. Rep. 528; 81 Fed. Rep. 329), there was a final judgment against the City and in favor of the Pacific Improvement Co. for $3,058.13 (p. 54).

In August, 1897, the judgment not being paid, the plaintiff, Pacific Improvement Co., took out an original fi. fa. (p. 54), which was levied on the certificate

(No. 147) representing the 250 shares of stock issued to the City. At the same time, a duplicate fi. fa. issued to the marshal of the Southern District of Mississippi (p. 58). Under these executions, the certificate of stock and all the interest of the City in the L. N. O. & T. Ry. Co. was sold by the marshal at public vendue at the western door of the United States Court House (p. 56), where it was bought in by the Pacific Improvement Co., plaintiff in the execution, for $100.00. (It appears that, at that time, the stock was regarded as of practically no value—p. 75). The marshal thereupon delivered this certificate to the Pacific Improvement Co., indorsing on the back thereof a formal transfer to that company (p. 47).

Shortly after the judgment was rendered in June, 1897, the officers of the city, apprehending a mandamus, resigned, and the municipal organization was completely disrupted (pp. 71-72). At a mass meeting of citizens, several months later (and after the execution sale), a committee of three was appointed to go to New York and settle, if practicable, the whole matter with the bondholders (pp. 71 et seq.). As a result, an agreement was reached in New York by which the bondholders transferred the bonds and also the judgment to the Planters Bank of Clarksdale in consideration of the cash payment of $25,000 (pp. 101-104). Immediately, the governor appointed new officials for the City and the municipal organization was restored. At the first council meeting, the action of the committee in New York was ratified and the City made an agreement by which it

arranged to reimburse the Planters Bank for the money it had expended (pp. 65-70). All of this occured in the latter part of June and the early part of July, 1898 (pp. 69-70). Mr. J. W. Cutrer, one of the committee mentioned and a lawyer of recognized ability (p. 73), represented the City in the litigation heretofore referred to, was elected City Attorney (a public office) upon the reorganization in June, 1898, and remained such for many years thereafter (p. 73). He, of course, was cognizant of all that had occurred. He was never called as a witness by the City at the trial of the present case.

As a result of this adjustment, the bondholders lost, and the City escaped the payment of over $13,000 of accrued interest.

From the time of the execution sale in December, 1897, nothing whatever was done by the City about this stock until the filing of the present bill in March, 1917, except that two or three former Mayors of the City testified on the hearing of this case that they made inquiries about this stock (pp. 80-85). There is no claim that either the Railroad Company or the Valley Company were ever approached on the subject until about the time the bill was filed in 1917.

During that interval the Valley Company purchased the stock in question from the Pacific Improvement Co. in 1904, and surrendered the certificate, No. 147 (which represented stock in the L. N. O. & T. Ry. Co.) for a certificate for an equal amount of stock in the Railroad Company (the Y. & M. V.), with which the L. N. O. & T. Ry. Co. had been consol-

idated in 1892, shortly after the original issuance of the stock (p. 64).

In that interval, Mr. W. A. Percy, who represented the plaintiff in the execution in the Circuit Court of the United States at Oxford, died, his death occuring about 1914 (p. 73).

There was no claim by the City that it had attempted to pursue any remedy whatever in the Court from which the execution issued.

SPECIFICATION OF ERRORS.

The assignment of errors filed with the petition for writ of error and the specification of errors embraced in the petition for certiorari are essentially the same and embody the following charges of error on the part of the Mississippi Supreme Court in its final decree (which was without opinion, and merely affirms the decree of the Chancellor—p. 118):

1. In adjudging that the execution sale here in question was void and cancelling, as a cloud on the City's title, any claim of any defendant to the stock in question.

2. In refusing to adjudge that the failure of the City (defendant in execution) to exercise its remedies in the Court issuing the execution was a bar to this bill filed nearly twenty years after the execution sale.

3. In refusing to adjudge that the City was estopped by its laches and its silence, the execution sale having occurred December 6, 1897, and no step whatever being taken by the City to assert its rights until the filing of this original bill in March, 1917—nearly twenty years. During most of this time, the official city attorney was a lawyer of ability who had represented it in the original litigation which had resulted in the execution and who, therefore, knew all the facts.

4. In holding that the City was not precluded from relief in a court of equity by the maxim of "clean hands." The City had gotten this stock by issuing $25,000.00 of its bonds, had promptly failed to pay interest thereon, and, after a judgment establishing its liability, had sought to escape payment by dissolving its corporate organization—as a result of all which it practically forced the bondholders to a settlement under which they lost, and it escaped the payment of, over $13,000.00 of unpaid past due interest.

5. In adjudging that the City made sufficient proof of its title to the stock in question to enable it to maintain this suit in equity when in fact a serious doubt as to its title existed.

BRIEF.

I.

The case presents a federal question for that:

(a) There is involved the validity and effect of an execution sale by the marshal pursuant to a judgment of the Circuit Court of the United States under an execution issued by that Court.

> Avery vs. Popper, 179 U. S. 314;
> Pittsburg etc. R. Co. vs. Trust Co. 172. U. S. 493;
> Tullock vs. Mulvane, 184 U. S. 534;
> Clements vs. Berry, 11 How. 398.

(b). There is involved here the applicability and effect of the Act of Congress of March 3, 1893 (27 St. L. 751) providing how personal property "sold under any order or decree of any Court of the United States," shall be sold which has been referred to by Judge Sandborn as embracing execution sales.

> Re; Brittania Min. Co. (C. C. A.) 203 Fed. 452.

It is no answer to this proposition that the Act of Congress of March 3, 1893, provides for a sale at "the Court House of the County," which is the same as the requirement of the Mississippi Code. For the effect of a failure to sell at the Court House of the County (in the instant case the sale was at the Federal Court House where the judgment was rendered) is a question as to which this Court will take its own view and will not be bound by the deci-

sion of the State Court. It seems clear from the decisions of this Court that an execution sale is not void but merely irregular where the sale occurs at the wrong place and, therefore, the sale is not subject to collateral attack on that ground.

Wheaton vs. Sexton, 4 Wheat. 503;
Voorheis vs. Jackson, 10 Pet. 474;
Griffith vs. Bogart, 18 How. 158;
Robertson vs. Howard, 229 U. S. 264.

(c). That a Federal question is here must follow the general principal announced in South Dakota vs. North Carolina, quoting from an opinion by Chief Justice Taney:

> "The award of an execution is a part, and an essential part, of every judgment passed by a Court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

So. Dakota vs. No. Carolina, 192 U. S. 320;
Borden vs. U. S., 117 U. S. 697;
Bank vs. Halstead, 10 Wheat. 64.

(d). There is also a Federal question for that, as is more fully argued *infra*, pp. 28-30, state laws adopted by the Conformity Act of 1872 (17 Stat. L. 196) respecting executions are, by virtue of their adoption, federal statutes—wherefore their construction and effect are for this Court to determine.

Cooke vs. Avery, 147 U. S. 390;
Buck vs. Colbath, 3 Wall. 334;
U. S. vs. Johnson Co., 6 Wall. 166;
Wayman vs. Southard, 10 Wheat. 49.

(e) It follows from the foregoing propositions that, by the final decree of the Supreme Court of

Mississippi, there is "drawn in question the validity of . . . an authority exercised under the United States and the decision is against its validity"—or else the case is one in which a "right . . . is claimed under . . . authority exercised under the United States and the decision is against that right."

Act of Sept. 6, 1916, c. 448, §2; 39 Stat. 726.

II.

All these Federal questions were set up in the answer of the plaintiffs in error (defendants below), were insisted upon specifically in the trial court (p. 107) and made the basis of assignments of error in the State Supreme Court.

Record, pp. 107-112-116.

III.

The decision of the State Supreme Court is not binding here on the theory that such decision was a construction of State Statutes, for the State Statutes involved were, pro hac, Federal statutes. It would be anomalous to say that this Court has jurisdiction to review the decree of the State Court on the application and construction of such statutes and yet is bound by the decision of the State Court thereon.

U. S. vs. Johnson Co., 6 Wall. 166;
Wayman vs. Southard, 10 Wheat. 49.
Infra, pp. 28-30.

IV.

The decree below necessarily decided federal questions. The claim of the City (defendant in error) that there were sufficient grounds other than those involving federal questions to sustain that decree, is untenable. There was no opinion rendered by the Mississippi Supreme Court, but that court could not possibly have decided the cause as it did, without holding that the sale by the marshal was void. There was no aspect of the case which would admit of a decree for the City if the validity of that execution sale had been upheld. "The regularity of the proceedings under the execution" (179 U. S. 314) was necessarily involved and a decision thereon unavoidable. The Chancellor's decree (p. 109) not merely declared the defendant in error here to be the owner of the stock in question but specifically declared null and void all claim to the stock as set up in the case by either the Mississippi Valley Company or the Railroad Company, and affirmatively cancelled such claim of title. That was, of course, an express adjudication that the execution and sale thereunder, on which the Mississippi Valley Company relied, was void.

Record, pp. 108-110.

V.

The judgment pursuant to which this execution sale was made was concededly valid (p. 54) and was rendered by a federal court; and there is no claim that the fi. fa. was irregular or invalid. On the con-

trary, it affirmatively appears that the fi. fa. and duplicate fi. fa. under which the execution sale was made, are regular on their face.

Record, pp. 54-58.

VI.

The right to levy an execution on this certificate of stock existed under the Mississippi Code of 1871 (the Code in effect when the Conformity Act of 1872 was passed) and by virtue of that Act. The Mississippi Code of 1892 is not applicable because there is no proof that any Mississippi statute subsequent to 1872 was adopted by any "general rules" of the federal court issuing the execution or otherwise. The existence of such rules has not been proven and cannot be presumed.

Rev. Code. of Miss. (1871), Sec. 849;
Boyle vs. Zachrie, 6 Pet. 659;
Wayman vs. Southard, 10 Wheat. 48-49;
Gen. Electric Co. vs. Hurd, 171 Fed. Rep. 984.

VII.

The law governing the place of sale under a federal execution is the Act of Congress of March 3, 1893 (27 Stat. L. 751) and not the Mississippi statute, because that act of Congress contemplates judicial sales and was designed to fix a uniform rule for judicial sales under decrees or judgments of federal courts. And an execution sale is a judicial sale.

3 U. S. Comp. Stat. (Ann.) 1916, Sec. 640-41;
Re: Brittania Mining Co., 203 Fed. Rep. 452;

Piano Co. vs. Hennington, 98 Miss. 51;
Seymour vs. Association, 116 Ga. 285;

VIII.

While the Act of Congress of March 3, 1893, provides that judicial sales shall be made at the court house of the county, and while the state statute, if applicable, fixes the same place, the fact that this execution sale was made at the front door of the federal court house in the county does not render the execution sale void but, at most, was an irregularity which cannot be available on collateral attack. The statutory requirement as to place of sale was directory and not mandatory.

Lansburgh vs. M'Cormick (C. C. A.), 224 Fed. Rep. 879;
Street vs. Larkin, 77 Ala. 580.
Infra, pp. 34-49, where other authorities are cited and reviewed.

IX.

The claim of defendant in error that the execution sale in question at which the vendor of the present holder of the stock acquired title was void because of a failure to advertise the sale as required by statute, is not sound for that there was no such failure and, in any event, a failure to follow strictly the statutory requirement as to advertisement is a mere irregularity which would not be available on collateral attack. The provisions of the statute in that respect are directory purely. Such is the well-established rule even in Mississippi.

Koch vs. Bridges, 45 Miss. 257;
Nevada Syndicate vs. Nickel Co., 103 Fed. Rep. 396; 112 Fed. Rep. 44, 184 U. S. 700;
McBride vs. Gwynne, 33 Fed. Rep. 202;
Rounsaville vs. Hazen, 33 Kan. 71, 76;
Conley vs. Redwine 109 Ga. 640;
Doe vs Jackson, 51 Ala. 514, 517.

X.

The purchaser at an execution sale depends on the judgment, the levy and the transfer of the stock certificate to him by the marshal. "All other questions are between the parties to the judgment and the marshal."

Wheaton vs. Sexton, 4 Wheat. 503.
Voorheis vs. Bank, 10 Pet. 477.

Here the judgment is admittedly valid, the levy in strict accord with the statute and the transfer by the marshal regular. If there were no proof as to the regularity of the levy, the law would presume its validity.

2 Freeman on Ex'ns, (3rd ed.) Sec. 274;
Hamblen vs. Hamblen, 33 Miss. 455.

XI.

The original and amended bill in this cause is a collateral attack on the execution sale in question, the plaintiff in the execution and the purchaser at that sale not being before the court and no direct assault being made in any pleading upon the regularity of said sale. The irregularities in the execution sale are not available on collateral attack.

Lansburgh v. M'Cormick (C. C. A.), 224 Fed. Rep. 879;
Rounsaville v. Hazen, 33 Kan. 71, 76;
Keystone Collieries v. Mudge, 256 Pa. 130;
1 Am. Law Rep. Ann. (1919) 1433;
Wheaton vs. Sexton, 4 Wheat. 503;
Robertson vs. Howard, 229 U. S. 264.

XII.

The execution sale in question being pursuant to a judgment of the United States Circuit Court, the remedy of the defendant in the execution was by a motion of that court, a remedy which has been pointed out by Mr. Justice Lamar only a few years before the sale. The failure of the City (defendant in the execution) to pursue that remedy or to exercise any other remedy in the federal court is and was a bar to the present suit.

Bornemann v. Norris, 47 Fed. Rep. 438;
Seaman v. Ins. Co. (C. C. A.), 86 Fed. Rep. 493;
Kirk v. Hamilton 102 U. S. 68;
Cunningham v. Cassidy, 17 N. Y. 282;
Ammons v. Whitehead, 31 Miss. 103.

XIII.

Where the purchaser at the execution sale fails to avail himself of the remedies in the court issuing the execution or elsewhere, but remains silent, he will not be heard after a long lapse of time, and after intervening rights have accrued, to aver that the execution sale was void. In the case at bar the execution sale occured in 1897. The Mississippi Valley

Company, a plaintiff in error here, purchased the stock in 1904 from the purchaser at the execution sale. At the time of the execution sale, the stock was admittedly worthless; the bill herein avers it is now worth $75,000. In that interval, the attorney for the execution plaintiff, necessarily an important witness, died. Nothing was done by the City, defendant in the execution, until the filing of the present bill in March, 1917—nearly 20 years after the execution sale—although its official city attorney and its citizens well knew the facts.

Record, pp. 1, 2, 64, 71, 73.
Griffith v. Bogert, 18 How. (U. S.) 158;
Patterson v. Hewitt, 195 U. S. 317;
U. S. v. Lane, 249 U. S. 367.
Nat. Nickel Co. vs. Nevada (C. C. A.), 112 Fed. Rep. 44, 48.
Harrington v. O'Reilly, 9 S. & M. 218.

XIV.

An execution defendant who accepts any part of the proceeds of the execution sale, either directly or indirectly, (in this case by credit on the cost bill) or in any other way acquiesces in the sale, is thereby estopped from questioning the validity of the sale, and this is true whether the sale be void or merely invalid for "it is a well-settled elementary principle that a void judicial sale is an exception to the rule that 'confirmation or ratification cannot strengthen a void estate.'"

Fallon v. Worthington, 13 Colo. 569;
Freeman on Void Judicial Sales, Sec. 50;

Kleber's Void Jud. & Ex'n Sales, Secs. 474, 476;
Clark v. Glos, 180, 111, 568.

"Nor is it absolutely essential that the execution defendant should actually receive the whole or even any portion of the money, as it is sufficient if he is cognizant of the sale and acquiesces therein by his failure to object thereto, and by his consent in the application of the proceeds toward the payment of his debts. He is shut off from subsequently impeaching the sale on the ground of its invalidity."

Kleber's Void Judicial Sales, Sec. 476.

If the collateral attack here made succeeds, the execution debtor is under no legal obligation to return the money paid by the purchaser at the sale.

Voorhees vs. Bank, 10 Pet. 475.

XV.

Where a sale is made under several executions, the sale is valid if good under any of them.

Pickett v. Bank, 5, S. & M. (Miss.) 470;
Lane v. McLain, 9 S. & M. (Miss.) 287;
Hand v. Grant, 10 S. & M. (Miss.) 517;
Shepherd v. Dolph, (Ky.) 58 S. W. 991.

XVI.

In order to maintain a bill of the character here involved, complainant must show a perfect legal or a perfect equitable title, otherwise the bill must be

dismissed without regard to whether the title of the defendant be good or bad.

Jones v. Rogers, 85 Miss. 803;
Bank v. Evans, 10 S. & M. (Miss.) 35.

(a) Conceding for the moment, and for the sake of argument only, the City's contentions as to the invalidity of the execution sale, there clearly remains a doubt whether the Pacific Improvement Company's right to retain the stock was impliedly conceded and the City's claim thereto waived by the settlement reached in New York by a committee, and afterwards ratified by the City, under which the bondholders waived over $13,000 of accrued interest, due by the City, at which settlement the matter of this stock was not mentioned, but the fact was that the Pacific Improvement Co. was then holding and claiming the stock, which fact was then well known to one of the committee (Mr. Carter), who had been attorney for the City in the litigation resulting in the execution and who was the City's official attorney for many years afterward.

Record, pp. 111-113, 119.

(b) The inaction of the City for nearly twenty years after the execution sale, during most of which time the attorney who represented the City in the litigation which resulted in the execution was the official city attorney, is explainable upon no other theory than that it was understood by the parties that, by the settlement mentioned, the City abandoned its claim to the stock and this created, at least, a serious doubt as to the City's title.

Record p. 119.

XVII.

The complainant (defendant in error) came not with clean hands for that it repudiated its bonds which it had given for the stock, contested for several years a suit on the bonds, and, when judgment was rendered for interest due thereon—thus establishing the validity of the bonds—the City disrupted its organization to avoid a mandamus. By these means it forced the bondholders to a settlement by which they lost over $13,000 of accrued interest. Under such circumstances complainant will be repelled in a court of equity.

Record p. 69;
Galloway v. Finley, 12 Pet. 264.

XVIII.

In its ownership of this stock the City was not acting in a governmental capacity, but as an individual. This rule is well settled with respect to Mississippi municipalities. The City was therefore subject to the rules just stated with respect to laches and estoppel.

Adams v. Railroad, 76 Miss. 714;
Hinds Co. v. Railroad, 85 Miss. 631.

ARGUMENT.

We wish to discuss somewhat more fully:—(1) The presence of a Federal question; (2) that it was a material one and was necessarily decided by the state court; (3) that the execution sale here involved was valid—certainly as against a collateral attack; (4) that the City's failure to exercise its remedy in the Court issuing the execution, is fatal; (5) that the City's long delay and inaction are an estoppel; (6) that the City makes no such proof of an undeniable title as is necessary in a bill of this kind, and (7) that the City comes not with clean hands.

I.

FEDERAL QUESTIONS PRESENT.

In Avery v. Popper, 179 U. S. 314, the Court said:

> "With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from the authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal Court, *or the regularity of the proceedings under the execution* are assailed."

Avery vs. Popper, 179 U. S. 314.

The same principle finds support in numerous other cases.

Pittsburg R. Co. vs. Trust Co., 172 U. S. 493.

The case of Buck v. Colbath, 3 Wall. 334, was an action of trespass for taking goods, against a marshal, and the "defendant relied solely upon the fact that he was marshal and held the goods under the writ in the attachment suit" issued by the United States District Court. There was judgment against the defendant and he brought the case to this court under the 25th section of the Judiciary Act. In maintaining jurisdiction, the Court said:

> "There seems to be no reason to doubt that the case comes within the provisions of the 25th section of the Judiciary Act. The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the Supreme Court of Minnesota."

Buck vs. Colbath, 3 Wall. 340.

2. There is also involved here the applicability and effect of the Act of Congress of March 3, 1892, which provides:

> "Sec. 1640. All real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the court house of the county, parish, or city in which the property, or the greater part thereof is located, or on the premises, as the court rendering such order or decree of sale may di-

rect. 'Sec. 1641. All personal property sold under any order of decree of any court of the United States shall be sold as provided in the first section of the Act (1640), unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner."

3 U. S. Comp. Stat. (Ann.) 1916, Sec. 1640-41, p. 3259; 27 Stat. L. 751.

This has been referred to as "regulating sales of real estate by courts of the United States."

Robertson v. Howard, 229 U. S. 259.

Referring to this Act, Judge Sanborn, speaking for the Court, has said:

> "Undoubtedly, the Act of March 3, 1893, applies not only to federal courts then in existence but also to those subsequently created, unless something in the organic act exempts them, and governs as well any possible new forms of judicial sales under decrees as foreclosure, execution, and partition sales then known."
>
> Re: Brittania Min. Co. (C. C. A.) 203 Fed. Rep. 952.

An ordinary execution sale is, essentially, "under an order" of the court. The usual provision in a common law judgment—"for which let execution issue"—is the order under which the sale is made. It is our view that this Act of 1893 was intended to govern all judicial sales, including execution sales, for the purpose of creating uniformity.

It will be contended that the Act of 1893 controls only "judicial sales" and that term does not include

sales under executions. But the authorities are the other way.

> "It is contended on behalf of the appellee that the laws which prohibit a judge from purchasing apply only to judicial sales, and that a sale made under a judgment of a justice of the peace is not a judicial sale within the meaning of the law. There is some authority to this effect; but the cases which hold that a sale made under the judgment of a justice of the peace is not a judicial sale so hold on a construction of their particular statute, and have no application to this case. In 16 Neb. 407, 20 N. W. 277, in the case of Neligh v. Keen, the court held that a judicial sale applied to sales under execution, as well as any other order, and in the case of Seymour v. National B. & L. Asso., 116 Ga. 285, the same is held."
>
> Piano Co. v. Hennington, 98 Miss. 51.

In Griffith v. Bogert, *which involved the validity of an execution sale by a sheriff under a judgment at law*, Mr. Justice Grier, speaking for the court, referred to the sale as a *judicial sale*, saying:

> "It is the well-known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser was a participant."
>
> Griffith v. Bogert, 18 How. (U. S.) 158.

3. The issuance of an execution and the proceedings thereunder were a part of the judgment of the

federal court. Mr. Justice Thompson, speaking for the Court, has said:

> "An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit, and which are expressly, by the act of Congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command."
>
> Bank v. Halstead, 10 Wheat, 64;
> Fink v. O'Neil, 106 U. S. 272.
> So. Dakota v. No. Carolina, 192 U. S. 320.

4. In so far as the statutes of Mississippi are applicable, they are federal statutes. Their construction and effect, in so far as federal executions are concerned, present a federal question.

In U. S. vs. Johnson County, 6 Wall. 166, Mr. Justice Clifford, speaking for the Court, said in this connection:

> "Congress may adopt state laws for such a purpose (enforcement of a judgment) directly, or confide the authority to adopt them to Federal Courts, but their whole efficacy when adopted depends upon the enactments of Congress; and they are neither controlled or controllable by any state regulation. U. S. vs. Peters, 5 Cranch 136; Boyle v. Zacharie, 6 Pet. 658."

Mr. Chief Justice Marshall, in dealing with the question whether state laws respecting executions passed subsequent to the Process Act of Congress (which adopted state laws then in existence), would become applicable to Federal Courts, declared the proposition unthinkable, because it would mean that the state had the right to regulate proceedings in Federal courts. "No gentlemen, we believe, will be so extravagant as to maintain the efficacy of" an act of the state regulating federal proceedings. "It seems not much less extravagant to maintain that the practice of the Federal courts, and the conduct of their officers can be indirectly regulated by the state legislature by an act professing to regulate the proceedings of the state courts and the conduct of the officers who execute the process of those courts."

Wayman vs. Southard, 10 Wheat., 49.

In Cook vs. Avery, 147 U. S. 390, the court was considering the rights of a plaintiff who claimed title to land as the purchaser at a sale of such land under a judgment of the Circuit Court of the United States. The validity of his purchase turned upon the existence of a lien of the judgement upon the land. And this in turn depended upon the effect of the Conformity Act of Congress adopting the state statutes and the subsequent rule of court adopting subsequent acts of the Legislature. In holding that the case, therefore, presented a federal question, although it was the law of Texas, whose interpretation and effect were being considered, the court said:

"It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject-matter was properly invoked."

Cooks vs. Avery, 147 U. S. 390.

"An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States. *And he does not, in such case, act under the authority of the state law, but under that of the United States, which adopts such law.*"

Bank vs. Halstead, 10 Wheat. 63-64.

"Such state laws have no operation, *proprio vigore*, upon the process or proceedings in the courts of the United States . . . . . The whole efficacy of such laws in the courts of the United States depends upon the enactments of Congress."

Beers vs. Haughton, 9 Pet. 359.

5. If any of the foregoing propositions are correct, the case is properly here, either on the writ of error granted by the Chief Justice of the State Court or on the petition for certiorari. For, clearly, by the decree of the State Court adjudging the execution sale by the marshal a nullity, there is "drawn

in question . . . . the validity of an authority exercised under the United States and the decision is against its validity." See particularly

Buck v. Colbath, 3 Wall. 340;
Avery v. Popper, 179 U. S. 314.

The plaintiffs in error set up in their answers the fact that they claimed under an authority exercised under the United States and this was submitted as a reason why the complainant (defendant in error) should not recover. One of the plaintiffs in error made its answer a cross bill, but at the hearing, and before the decision of the cause by the Chancellor, the claim to any relief under the cross bill was expressly waived (p. 107). There was, therefore, no assertion by these plaintiffs in error of an authority exercised under the United States *for the purpose of obtaining affirmative relief,* but such authority was relied on solely as a defense to the suit against them.

In Tullock vs. Mulvane, 184 U. S. 512, there was a suit in the State Court on an injunction bond which had been given pursuant to a bill in equity filed in the Federal Court. The question was whether this court had jurisdiction to issue a writ of error to review the judgment of the State Court in the action on the injunction bond. The right to this review was claimed by the defendant in that action on the ground that the bond sued on had been given pursuant to a requirement of the Federal Court, and this court, sustaining the jurisdiction, said:

> "For, if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority and not by the local law."

The line is very shadowy between those cases in which it may be said that the decree of the State Court decided against "the validity of an authority exercised under the United States," and those cases in which it decides either for or against "a title, right, privilege or immunity claimed under . . . . an authority exercised under the United States."

For example, in the recent rate cases wherein was involved the question as to whether the Federal government had a right to fix intra-state rates, during Federal control, there was in the North Dakota case, 250 U. S. 135, a peremptory mandamus compelling the railroad company and the Federal Director General of Railroads to desist from collecting intra-state rates other than those fixed by the state. This court entertained a writ of error directed to the Supreme Court of North Dakota. Undoubtedly there was a decision by the State Supreme Court against the validity of an authority exercised under the United States—that authority being conferred by Act of Congress providing for Federal control. At the same time it was equally true that the railroad and the Federal Director General claimed an immunity by virtue of an authority ex-

ercised under the United States. If the former view be taken, no writ of error could be allowed, but only a certiorari.

It was with this difficulty in mind that we thought it proper to ask in this case for both a writ of error and certiorari, such course being in accord with the practice where counsel are reasonably in doubt as to the proper remedy.

Farrell vs. O'Brien, 199 U. S. 89;
Montana Min. Co. vs. St. Louis Min. Co. 204 U. S. 213;
Gompers vs. United States, 233 U. S. 604.

In the last named case there was an appeal, a writ of error and a petition for certiorari.

As the case at bar is in this court on a petition for certiorari filed in time and presented in time, it is not a matter of serious importance whether jurisdiction is maintained on the one ground or the other, and we have merely sought to justify our action in taking both courses.

II.

THE FEDERAL QUESTION MATERIAL.

The materiality of the federal question and the fact that it was necessarily decided by the state court, appears from the pleadings and the decree of the Chancellor (pp. 108-110) which was affirmed, without opinion, by the State Supreme Court. The whole case hinged on the validity of the execution

sale by the marshal pursuant to a judgment of the federal court. The title acquired by the purchaser at that sale and the title of his subsequent vendee were expressly cancelled by the decree.

III.

EXECUTION SALE NOT VOID.

The execution being from a federal court and the applicable statutes being, *pro hac,* federal statutes, the principles of general law as announced by this Court must control here. Among those principles, one is well settled that mere irregularities in an execution sale afford no ground for a collateral attack. As to what are irregularities and what are essentials, this court has made it clear in Wheaton v. Sexton, 4 Wheat. 503, that the essentials, so far as the purchaser at the execution sale is concerned, are the judgment, the levy and the deed. In short, the marshal had *power to sell.* His sale was, therefore, not an act ultra vires, as if he had sold outside the jurisdiction, or without a valid writ, or without a valid judgment.

In the case at bar, there was a judgment admittedly valid; the execution is regular on its face and no attack is made on it; the levy was in strict accordance with the statute; there is no attack on the advertisement but if there were it is well settled, even in Mississippi, that a failure to follow the statute strictly in that respect is a mere irregularity (Koch v. Bridges, 45 Miss. 257; Nevada Syndicate v. Nickel Co., 112 Fed. Rep. 44; 184 U. S.

700); the place of sale was in the proper county and at the court house where the judgment was rendered and the execution issued and there is no suggestion that any better sale could have been made at the county court house; there was not the slightest complaint from the defendant in execution until twenty years later.

The sale was, therefore, not void. It was, at most, irregular merely and not subject to this collateral attack.

> Street v. McLarkin, 77 Ala. 580;
> Cunningham vs. Cassedy, 17 N. Y. 281;
> Newton v. Bank, 14 Ark. 15;
> Lansburg vs. McCormack, (C. C. A.) 224 Fed. Rep. 879.

It is important to note, in this connection, the language of Mr. Justice Baldwyn in upholding an attachment sale where a number of the statutory requirements had not been observed:

> "There is no provision in the law that, if the several acts therein directed to be done, are omitted, the sale or any other proceedings under the attachment shall be deemed void; but by the Thirteenth Section it is declared that every sale and conveyance made by the said auditors, or any two of them, by virtue of the authority herein granted, shall be as binding and effectual as if the same had been made by the said defendant, prior to the service of the said attachment . . . . . The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done or direct

> that their performance shall appear on the record. The Thirteenth Section which gives to the conveyance of the auditors the same effect as a deed from the defendant in the attachment, contains no other limitation than that it shall be 'in virtue of the authority herein granted.' "
>
> Voorhees v. Bank, 10 Pet. 471.

The Mississippi Statute authorizing a levy on shares of stock provides:

> "The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant."
>
> *Infra*, Appendix, p. 65.

Much significance is to be attached to the absence from the statute of any provision to the effect that a failure strictly to pursue the statutory methods shall invalidate the sale. In addition to the language of this Court by Mr. Justice Baldwin, just quoted, see

> Newton v. Bank, 14 Ark. 15;
> Jackson v. Spink, 51 Ill. 406;
> Minor v. Natchez, 4 S. M. (Miss.) 631; 10 S. & M. 25.

The absence from the statute here involved of the not infrequent provision that a failure strictly to follow the statute avoids the sale; the express provision (not applying to sales of land) that the purchaser shall hold as if the personalty sold had been regularly assigned to him by the defendant in the

execution; the existence of remedies in the court issuing the execution (*infra*, p. 50) all necessitate the conclusion that an execution sale of *personalty* at the wrong place is irregular merely, not void, and, therefore, not subject to collateral attack.

As long ago as Wheaton v. Sexton, 4 Wheat. 803 (followed in Voorhees vs. Bank, 10 Pet. 477) this Court stated the rule to be:

> "The purchaser depends upon the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return; whether he makes a correct return or any return at all to the writ, is immaterial to the purchaser; provided the writ was duly issued and the levy made before the return."

Wheaton v. Sexton was quoted and followed in Minor v. Natchez, 4 S. & M. (Miss.) 631, which expressly referred to a number of Tennessee cases apparently holding the contrary and pointed out that such cases rested on an express statutory provision (not found in the Mississippi Code) that any sale not made in strict conformity with the statute, should be null and void for all purposes.

In Lansburgh v. McCormick (C. C. A.) 224 Fed. Rep. 874, the court had under consideration the Act of Congress of 1893, (27 Stat. L. 751) heretofore referred to. The complainants were attacking a sale as a nullity because it was made in the City of Charleston and not, as required by the Federal act,

on the premises or at the court house door of the county in which the land lay. In upholding the sale the court said:

> "The court having jurisdiction to order the sale, the mistake of directing that it be made at a place different from that required by the statute did not make the sale void for want of jurisdiction, but was an error to be corrected by appeal or by direct application to the trial court."

In that case there was also involved the validity of a tax sale made some years before. The court said:

> "The sound view is that all requirements of the law leading up to tax sales, which are intended for the protection of the taxpayer against surprise and sacrifice of his property, are to be regarded mandatory and to be strictly enforced. On the other hand, those provisions of the statute, designed merely for the guidance of the officer in order to secure the due and orderly conduct of the public business, concern the state only, and, as to the individual taxpayer, are to be regarded directory; and the courts will not in his behalf declare a tax sale void for failure by the officer to follow the strict letter of such provisions of law."
>
> Lansburgh v. McCormick, (C. C. A.) 224 Fed. Rep. 879.

In Cunningham v. Cassidy, 17 N. Y. 275, there was a sale of land in gross under an execution, in disregard of the statute, which required it to be sold in parcels. The court held that this disregard of the

statute made the sale voidable only, saying that "it has never been held that an irregular sale of several parcels at once was *ipso facto* void so that no title could pass by the Sheriff's conveyance; in other words, it has never been decided that the question was one divesting the power of the Sheriff so to sell." The court said further:

> "We are not unmindful of the rule applied in many cases, that a statute authority whereby a title may be divested must be strictly followed in all the requisites which appear to be beneficial to the owner. But those are cases where the authority is special and in derogation of the common law. The rule which covers that has little or no application in the regular judgments of court and the process issued to enforce such judgment. Before the judgment can be rendered, the party has had his day in court, and when it is rendered, the execution becomes a matter of right. This constitutes the power to sell, a power against which no defense can be alleged if the judgment has been duly rendered and the execution duly issued. The process is under the control of the court from which it issues, and so is the sheriff's sale. *If the directions of the statute are not strictly followed, or if there be any other irregularity, the party aggrieved can be heard in a summary way by moving to set the sale aside.*"

Cunningham v. Cassidy, 17 N. Y. 281.

In Newton v. State Bank, there was a sale of land under an execution made without statutory notice and on a day different from that prescribed for sheriff's sales. The court held that the sale was

nevertheless good as to a bona fide purchaser thereafter, saying:

> "The sale then was not void for want of power in the sheriff to sell and as regards the irregularity in selling on a day different from that directing the sheriff's sales and without notice; these are irregularities which rise in the exercise the powers conferred. A departure by the officer from the statutory direction as to the manner of executing his power does not affect the title of a bona fide purchaser at sheriff's sale. This has been so repeatedly decided by this court that it may now be held as settled law."
>
> Newton v. State Bank, 14 Ark. 15.

In that case the court, as other courts have done, distinguished the Tennessee cases because the Tennessee Statute expressly provides that a failure to follow the statutory requirements shall render the sale void.

In Jackson v. Roberts, 7 Wend., 86 (approved in Newton v. State Bank, 14 Ark. 11), parol evidence was held inadmissible to contradict a sheriff's deed. After commenting on the effect of a different rule, the court concluded:

> "We see no formidable mischief likely to result from the operation of such a principle. A party who may be injured by the mistake of a sheriff can have relief by a summary application to the courts under whose authority the sheriff's act, or through the medium of a court of equity, and it is much better that he should

be confined to this mode of redress than to render all titles derived from judicial sales doubtful."

Jackson v. Roberts, 7 Wend., 86.

In Street v. McLarkin, 77 Ala. 580, where a sale of personalty was under an execution issued by a justice of the peace and was made in a county and precinct other than that of the defendant's residence in violation of the statute, the court held that while this was an irregularity it would not render the sale void.

In Nevada Syndicate v. Nickel Co., 103 Fed. Rep. 397, (affirmed 112 Fed. Rep. 44; certiorari denied 184 U. S. 700) the Court quoted as follows from Rounsaville v. Hazen, 33 Kan. 71, 76, in which the advertisement of sale seriously failed to follow the statute:

"Does this omission render the notice void? We think it renders the notice voidable, and for that reason the sale might have been vacated or set aside upon proper motion before its confirmation. McCurdy v. Baker, 11 Kan. 111; Whitaker v. Beach, 12 Kan. 492. But we do not think that the omission renders the sale void, or that it may be treated as void in any collateral proceeding or upon any collateral attack."

Nevada Syndicate v. Nickel Co., 103 Fed. Rep. 397.

"Sales made at an improper place are sometimes held to be voidable merely and to be valid until set aside (Street v. McLarkin, 77 Ala. 580; Nixon vs. Cobleigh, 52 Ill. 387). This seems to

be a very reasonable and just view of the case; but it is undoubtedly in conflict with the majority of authorities."

2 Freeman on Executions (3rd ed.) Sec. 289.

Mr. Freeman then refers to several cases holding that an execution sale by a marshal at the door of the Federal court house instead of the county court house is void. The only cases he cites are from Texas, with the exception of an Indiana case (Jennings v. Doe, 9 Ind. 461) in which the marshal's sale was held void because not made in the county where the land lay but in a county 150 miles distant.

2 Freeman on Executions (3rd. ed.) ec. 289.

The case here being determinable upon the general law, it is proper to point out that it is the policy of the law that at all judicial sales as large a price as possible shall be realized. This undoubtedly is in the interest of the judgment debtor, for even if the property fails to bring the full amount of the debt, it is to his interest that the deficiency be as small as possible; if the price obtained be larger than the debt he gets the surplus. Such a policy is certainly not forwarded by allowing judicial sales to be upset upon slight pretext or for mere irregularities which do not injuriously affect the parties. For to upset judicial sales on such grounds must necessarily go to destroy in the minds of the public at large all faith in the validity of judicial sales and result in property being sacrificed, thus injuring both the judgment creditor and the judgment debtor.

No more wholesome policy could be promoted than that which creates in the public mind faith in the validity of court sales and this can never be accomplished if such sales are set aside too readily or for mere technicalities.

The case of Jackson v. Spink, 51 111. 506, was an action of ejectment on the ground that defendant's ancestor in title held under an execution sale which was void because the sale was made on the day after the advertised day. In refusing to hold the sale void for that reason, the Court emphasized the point that the statute did not declare an execution sale void for failure to follow the law strictly and also that, though the defendant in the execution lived for seven years after the sale, he made no motion to set it aside. The Court added:

> "Look at the effect upon judicial sales if the law be declared that they are void for want of the exact notice required. Persons would be deterred from bidding if they were bound to prove a strict observance of the Statute and the consequence would be that property must be greatly sacrificed, or, perhaps, sales entirely checked. Parties would not purchase if they knew that they were compelled, in order to maintain a title, to prove the performance of every duty imposed upon the officer. The necessary consequences would be injurious to both the creditor and the debtor."
>
> Jackson v. Spink, 51 Ill. 406.

In Robertson v. Howard, there was a sale of land of the bankrupt. The notice of sale described the land as lying in Range 1 when, in fact, it lay in

Range 34. There was an utter lack of the appraisement required by the statute. The sale realized only $2 00, though the land embraced two quarter sections —320 acres. The Court upheld the sale, saying:

> "As regards the alleged lack of an appraisement and error in the description of the property covered by certificate, contained in the public notice, we think they must, in this collateral proceeding, be deemed as mere irregularities."
>
> Robertson v. Howard, 229 U. S. 264.

While the Court attached effect to the confirmation of the sale, the proposition remains that the sale was never *void*,—for, while a defendant may ratify or confirm a void sale, no confirmation by a court can give validity to such a sale,—to an act wholly *coram non*.

The principal reliance of the defendant in error is on the cases of Koch vs. Bridges, 45 Miss. 257, and Jones vs. Rogers, 85 Miss. 802, in each of which the Court denied equitable relief to a plaintiff who relied upon an execution sale not made at the court house of the county, and Smith vs. Cockrill, 6 Wall. 756, in which the execution sale was held void for want of appraisement. We believe each of those cases is distinguishable from the instant case.

Koch vs. Bridges was a suit for an injunction, by a plaintiff claiming under an execution sale, to enjoin as a cloud on his title, the foreclosure of a mortgage executed by the defendant in the execution some

time before the execution sale but after the lien of the execution had attached. That sale, instead of being made at the county court house, was made at the market house in the town of Summit. Whether Summit was the county seat or not does not appear. The Court dismissed the bill, holding that under the statute "the place of sale is believed to be of the essence of the sale and the statute in this respect is mandatory." It did not declare in so many words that the sale was void. That sale occurred May 4, 1868.

The case of Jones vs. Rogers (85 Miss. 802) was a suit to remove a cloud, brought by complainants who claimed under an execution sale by the marshal pursuant to a Federal judgment. The marshal's sale occurred in 1839 and was made at Jackson, Mississippi, at the front door *of the state house*. The Court held the sale void for two reasons: (1) the land was insufficiently described, the return on the execution failing to show in what county or state the lands were situated, merely describing them as "lying on or near the seashore in the vicinity of Mississippi"; and (2) the sale occurred in Jackson, Mississippi, and not at the court house of the county where the land was situated—the two counties being more than a hundred miles apart.

It thus appears that in each of these cases the point actually decided was that the plaintiff in equity, who claimed under an execution sale, failed to make proof of that clear and indisputable title which is a condition precedent to the right to main-

tain a bill to remove a cloud. Indeed, the first part of the opinion in Jones vs. Rogers is devoted to a most emphatic statement of the rule that the plaintiff to such a suit must show "that he has a *perfect* legal or *perfect* equitable title to the property" (italics not ours). Each case was an effort by the purchaser at an execution sale to invoke the affirmative interposition of a court of equity upon a doubtful title and the same result would have followed whether the doubt as to the title arose from an irregularity merely, or from a vital defect. Neither case presents the question we have here—the right of an execution debtor to make a collateral attack on an execution sale because it occurred at the wrong place.

A further reason why Jones vs. Rogers is not conclusive here is the fact, as appears from the opinion (85 Miss. 830), that at the time of the sale (Oct., 1839) there was in force a special Act of Congress approved February 16, 1838, respecting the place of execution sales by marshals. So that the marshal's sale there involved was governed by a specific Federal statute. The opinion, therefore, while by a learned Court, can have no more effect here than the decision of any other State Court on a Federal question.

Koch v. Bridges, 45 Miss. 255;
Jones vs. Rogers, 85 Miss. 830.

Much reliances is placed by defendant in error on the case of Smith v. Cockrill, 6 Wall. 756. The Court there held an execution sale by the marshal was "irregular and void and his deed conveyed no title."

The defect in the proceeding by the marshal was a failure to observe that provision of the Kansas statute "which required an appraisement of the property levied on and that it shall be sold on the execution for two-thirds of its appraised value." The report of the case is quite meagre. It does appear, however, from the argument of the defendant in error there, that there was no confirmation of the sale, that the marshal was never ordered to make a deed and that under the statute he could not be empowered to make a deed until after confirmation of the sale or until ordered to do so. We copy, as appendix B hereto the Kansas statute in that case

Assuming then that, under the applicable law of Kansas, an appraisement was a condition precedent to the sale and that the marshal could not be empowered to make a deed until after confirmation nor even then until ordered to do so, the decision of the Court is clearly distinguishable from the present case. The plaintiff in error there claimed under a deed made by the marshal without any shadow of authority.

Quite recently this Court has held that a failure correctly to describe the property sold and a failure to have it appraised as required by statute, are "mere irregularities and do not render the sale void or subject to collateral attack."

Robertson v. Howard, 229 U. S. 254, 264.

Another ground of distinction of the instant case from Smith vs. Cockrill, is this: Smith vs. Cockrill

was decided under the Act of Congress of 1828 (4 Stat. 278) which was re-enacted August 1, 1842 (5 Stat. 499) and provided:

> "That the forms of mesne process, except the title, and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted into the Union since the 29th of September, 1789, in those of common law, shall be *the same* in each of said states, respectively, as are now used in the highest court of original and general jurisdiction of the same."

Until the enactment of Section 916 of the Revised Statute, presently to be quoted, this Act governed the entire proceeding in the case, including the execution and sale thereunder.

> Wayman vs. Southard, 10 Wheat. 32;
> Lamaster vs. Keeler, 123 U. S. 376.

The Act governing the proceeding in the instant case was the Conformity Act of 1872 which provided:

> "The parties recovering a judgment in any common law cause in any district court, shall be entitled *to similar remedies* upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any laws hereinafter enacted which may be adopted by general rules of such district court."
>
> Rev. Stat., Sec. 916.

In other words, the controlling Act in Smith vs. Cockrill required the mode of proceeding to be "*the same*" while the Act of Congress governing the instant case provided merely for "similar remedies." In one case absolute conformity with the State Act was required, while in the instant case merely substantial compliances is called for.

"THE COURT HOUSE OF THE COUNTY"

Does this necessarily mean the County court house? May it not mean the court house in the county at which the judgment was rendered and from which the execution issued and where the officer had his office? The exact language of the applicable Mississippi Statute is: "All sales by any sheriff or other officer, by virtue of any execution or other process, shall be made at the court house of the county."

Revised Code Mississippi (1871), Sec. 846.

The Alabama Supreme Court has held that if a county has two courthouses, at which are situated courts of co-equal and co-ordinate powers of jurisdiction, an execution sale of real estate may be made at either court house under a statute providing that execution sales must be made "at the court house of the county."

Anniston Pipe Works vs. Williams, 106 Ala. 324.

As already pointed out in the two Mississippi cases which are the principal reliance of the defendant in error here, the sale was not made, in either

instance, at any court house and in the later case was made in a county far removed from the county where the land lay.

Koch vs. Bridges, 45 Miss. 257;
Jones vs. Rogers, 85 Miss. 829-30.

IV.

FAILURE TO PURSUE OTHER REMEDIES.

But a short time prior to this sale, Mr. Justice Lamar, sitting in Circuit, pointed out the remedy available to a defendant in execution—a motion to quash the levy—when the exact error here complained of was being made by the marshal—a sale at a place other than the court house of the county.

Bornemann v. Norris, 47 Fed. Rep. 438.

The same rule had long been recognized in Mississippi.

Harrington v. O'Reilly, 9 S. & M. (Miss.) 216;
Ammons vs. Whitehead, 31 Miss. 99.

The present holder of this stock—the Mississippi Valley Co.—was not a party to the suit in which the execution issued but bought the stock seven years afterwards.

Record pp. 64-65.

That the failure of the execution debtor to pursue his remedy in the Court issuing the execution, is fatal has often been declared.

Lansburg v. McCormack (C. C. A.) 224 Fed. Rep. 874;
Cunningham v. Cassidy, 17 N. Y. 281;
Jackson v. Roberts, 7 Wend. 86;
Jackson vs. Spink, 51 Ill. 406;
Kirk v. Hamilton, 102 U. S. 68.
Infra, pp. 55, 58, 59.

"The provision of the statute of the United States requiring that in all cases four weeks' notice should be given of the time of sale was intended for the benefit and protection of the judgment debtor, and created a privilege and right which the judgment debtor in any case may insist upon or waive. In the present case the right so given was waived by the failure of defendant to make any objections upon that ground prior to the confirmation of the sale."

Nevada Syn. v. National Nickel Co., 103 Fed. Rep. 399.

V.

LACHES, DELAY FOR TWENTY YEARS, ESTOPPEL.

This execution sale occurred Dec. 6, 1897. The litigation on which it was based and the bond issue involved in it were the subject of constant public discussion by the citizens of Clarksdale, whose charter had been surrendered to avoid a mandamus to collect the federal judgment. Mr. Cutrer, a lawyer of known ability, represented the City in the litigation and, on the re-organization of the City in July, 1898, became again the official City Attorney and remained such continuously for many years. The City,

officially and in every other way, was, therefore, fully cognizant of all that had taken place. Yet absolutely no step was taken, no complaint or demand made, until the filing of the present bill in March, 1917—nearly twenty years after the sale.

In that interval, Mr. W. A. Percy, who represented the plaintiff in execution and had directed the execution sale, had died, the stock had been sold, in 1904, by the original purchaser to the present owner, and the stock itself, which was regarded as practically worthless at the time of the sale (p. 75) had become worth, according to the original bill herein, $75,000.00 (p. 2). In the light of this, the language of Mr. Justice Baldwin is peculiarly pertinent:

> "Acts of limitation become useless if a defendant is allowed to evade them by avoiding judgments, or executions, on the suggestion of defects or omissions in the record, which can be reviewed only by an appellate court; a direct premium is held out for delaying the resort to the mode pointed out by law for correcting the errors of judicial proceedings. His debt is paid by the purchaser; the property purchased is restored to the defendant without any obligation to refund; and that which was, when sold, of little value, and bought at its full price paid to the defendant's use, becomes his rightful estate when the remote out-lot has become a mart for commerce, and covered with valuable improvements."
>
> Voorhees v. Bank, 10 Pet. 475.

No better statement of the doctrine of laches as a part of federal jurisprudence has been made than that of Mr. Justice Brown in Patterson vs. Hewitt, 195 U. S. 317:

> "The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if the day after, it will be defeated. In suits of equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but it is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time of the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of the action, as well as his diligence in availing himself of the means of knowledge within his control—are all material to be considered upon the question

whether the suit was brought without unreasonable delay."

Patterson vs. Hewitt, 195 U. S. 317,
See also Kirby vs. Lakeshore, 120 U. S. 130;
Humphreys vs. Walsh, 248 Fed. Rep. 418.

The instant case presents several salient facts calling for an application of these principles. In the first place, the value of the stock is stated in the oroginal bill herein to be now $75,000.00. At the timeof the execution sale, it was regarded as worthless, and its alleged worthlessness was set up by the City in the suit against it by the bondholders as one reason for the invalidity of the bonds.

Record, p. 75.

In the second place, Mr. W. A. Percy, who represented the bondholders in the litigation against the City and in the execution sale, died several years before the bill herein was filed. Undoubtedly he could have testified to all the facts connected with this execution sale and it is easily conceivable that by him could have been proven some fact indicating an acquiescence in the sale by the City.

In the third place, the actual lapse of time between the execution sale and the filing of the bill herein was 19 years and three months. During that time, the city, not merely omitted to pursue its remedies in the court issuing the execution, but failed to make any complaint whatever. When through its committee, it settled with the bondholders in New York six months after the execution sale

it made no claim for the stock, although one of the members of its committee, Mr. Cutrer, had represented it in the litigation and undoubtedly was fully familiar with the facts. The only person who could have testified about the details of the execution sale was Mr. Cutrer. The City did not call him as a witness and, of course, the defendant could not have called him because all his knowledge of the matter was acquired in the professional relation of attorney.

In an early case, Mr. Justice Grier, for the Court, said:

> "The sheriff's deed in the present case is founded on a regular judgment in a court of competent jurisdiction, and an execution on said and levied on property subject by law to be taken and sold to satisfy the judgment. The writ authorized the sheriff to sell; a sale was made in pursuance thereof by the sheriff, and a deed executed to the purchaser; which was afterwards acknowledged in open court according to law. At this time, all parties interested could and would have been heard to allege any irregularity in the proceedings that would justify the court in setting it aside. The objections to this sale *do not reach the power of the court, or the authority of the sheriff to sell.* The issuing of an execution on a judgment before the stay of execution has elapsed, or after a year and day without reviving the judgment, the want of proper advertisements by the sheriff, and other like irregularities, may be sufficient ground for setting aside the execution or sale, on motion of a party to the suit, or anyone interested in

the proceedings; but when the objections are waived by them, and the judicial sale founded on these proceedings is confirmed by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action."

Griffith v. Bogert, 18 How. (U. S.) 158.

Much the same view is expressed in Harrington v. O'Rielly, 9 S. & M. (Miss.) 218, where it is said that the undoubted rule was that an execution, the teste of which bears date after the death of the defendant, should be quashed on motion. The court then said:

"The question generally arises, when a sale has already taken place, and where the contest is between the purchaser at the sale, and some other person, in regard to the property. In such case the courts have uniformly decided, that the execution is not void, but voidable, and refused to set aside a sale under it, made at a time when the execution was valid. The execution is valid, until voided, and a stranger who purchases under it, willbe protected. His rights are not to be affected by subsequent acts, over which he had no control."

Harrington v. O'Rielly et al, 9 S. & M. 218.

In this connection it must be borne in mind that, with respect to this stock, the City was in the same

situation as a private individual, and not acting in a governmental capacity at all.

Adams v. Railroad, 76 Miss. 714;
Hinds Co. v. Railroad, 85 Miss. 631.

In the case of National Nickle Co. v. Nevada Syndicate (CCA) 112 Fed. Rep. 46 (certiorari denied 184 U. S. 100) there was a suit in ejectment to recover certain land from the defendant who had bought at a judicial sale. The Court said:

> "The general rule that in actions in ejectment in United States Courts the strict legal title prevails to the exclusion of an equitable defense, as stated in Hickory v. Stewart, 3 How. 750, and Foster v. Mora, 98 U. S. 425, is subject to certain well defined exceptions. *One of this is the defense of an equitable estoppel* This defense was sanctioned by the Supreme Court of the United States in Kirk v. Hamilton, 102 U. S. 68, and in some of its features that case is like the present one . . . . . This case upon the facts stated, is an authority in the present case and disposes of the questions as to the right of the defendant to set up an equitable defense to the cause of action; and it also determines the admissiibility of the evidence to which objection was made, and the sufficiency of such evidence toestablish an equitable estoppel."

The U. S. Circuit Court of Appeals therefore held that the plaintiff in ejectment was precluded by an equitable estoppel arising out of his conduct in failing to object to the sale when it was made, or within

a reasonable time thereafter, and until the rights of third parties had intervened.

National Nickel Co. v. Nevada Syn. (CCA) 112 Fed. Rep. 46-47.

In the case of Kirk v. Hamilton, 102 U. S. 68, above referred to, which was in action in ejectment in which the defendant claimed under a judicial sale, the court applied an equitable estoppel arising out of the inaction and apparent acquiescence of the plaintiff in ejectment, and said:

> "Undoubtedly he (the plaintiff in ejectment) then knew—he must be conclusively presumed to have known, after he appeared before the auditor—all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If the sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in which had been done in his absence."

Kirk v. Hamilton, 102 U. S. 68.

In Cunningham v. Cassidy, 17 N. Y. 282, the court held that a sale by the sheriff in gross instead of in

parcels, as required by the statute, was voidable only, and then said:

> "But it is claimed that although the sale under the judgments was not void was never theless voidable and that Cassidy, the judgment debtor, may now, in effect, avoid it by pressing the claim of the respondent to the surplus money. We think not. Cassidy acquiesced in the sale until, by the lapse of twelve months, his only right to redeem was gone; and the rights of judgment and mortgage creditors then attached."
>
> Cunningham v. Cassidy, 17 N. Y. 282.

> "The law does not permit a party to stand by in silence while judicial proceedings are in have intervened, and then challenge their validity on account of such erroneous procedure. He who has been silent as to his alleged right when he ought in good faith, to have spoken, shall not be heard to speak when he ought to be silent. Banks v. Lee, 13 Pet. 106."
>
> Nat'l. Nickel Co. v. Nevada Syn. (C. C. A.) 112 Fed. Rep. 44. 48.

V I.

COMPLAINT FAILS TO PROVE CLEAR TITLE.

In an early case in Mississippi, the rule in this connection was thus stated:—

> "He who comes into equity to get rid of a legal title, which is alleged to overshadow his own, must show clearly the validity of his own title, and the invaidity of his opponent's. He

cannot expect a court of equity to set aside a legal title, upon a doubtful state of case."

Banks v. Evans, 10 S. & M. (Miss.) 35, 62.

The same principle has later been even more emphatically announced.

Jones v. Rogers, 85 Miss. 825-6.

The complainant here has wholly failed to meet these requirements. Certainly, if there is any doubt whatever as to the ownership of this stock that doubt must, under the authorities just cited, be resolved in favor of the defendant. Conceding for the moment and for the sake of the argument only, that complainant's contentions as to the validity of the execution sale by the marshal are sound, there still clearly remains a doubt as to whether the settlement made in New York on June 30, 1898, by the committee from Clarksdale with the holders of the bonds (which agreement the city shortly thereafter ratified) did not, impliedly if not expressly, concede the ownership of the stock to be in the Pacific Improvement Company and therefore amount to a surrender by the city of its right to the stock. In other words, it is not a fair implication from the facts and circumstances of that settlement, that there was an undersanding that all matters then in controversy between the City and the Pacific Improvement Company were thereby compromised and settled—including the right the City now asserts to assail the title which passed by the execution sale.

Point is given to such an implied settlement by the fact that the bondholders (Pacific Improvement Co.

and R. T. Wilson & Co.) held bonds of the city on which there was then accrued and unpaid, interest aggregating $13,366.25. These bonds had been judicially declared to be valid. The bondholders surrendered every cent of this interest.

If then, there is any fair implication that this settlement concluded all matters in dispute between the parties, certainly there is more than a doubt as to the City's title to this stock, and, at best, the City is seeking relief "upon a doubtful state of case."

Banks v. Evans, 10 S. & M. 35, 62.

Another circumstance which points strongly to the fact that the settlement of June 30, 1898, was intended to embrace everything in controversy between the City and the bondholders, including the right of the Pacific Improvement Company to retain the stock which it then held, is the inaction of Mr. Cutrer, who represented the City throughout the litigation, who again became City Attorney upon the reorganization of the City in July, 1898, and remained City Attorney for many years. The record shows that Mr. Cutrer was then and is a lawyer of undoubted ability and certainly it must be assumed that he was loyal to the interests of his client. It is unbelievable that Mr. Cutrer, with full knowledge of the facts and knowing well the law now relied on by the City, could have remained idle with respect to this stock during so long a period if the city had, in his judgment, any right to the stock. In other words, his silence and inaction in the matter can only be explained on the theory that by the settlement in

New York in June, 1898, and the subsequent ratification thereof by the City a few days thereafter, he regarded all controversies between the City and the bondholders as ended and that it was understood that the Pacific Improvement Company should remain in ossession of this stock.

That agreement specifically provided, not only for the transfer of the $25,000.00 of bonds, but also for an assignment of the judgment which the Pacific Improvement Company had obtained against the City. It even went into details of the court costs. It recited the payment to the Pacific Improvement Company and R. T. Wilson & Co., of $25,000.00 in cash and then proceeded to fix the rights which the other parties to the agreement were to have, namely, all of the bonds with their matured and unmatured coupons, the assignment of the judgment against the City and of all interest in pending suits against the City. It further provided that all costs already paid should be assumed by the two companies mentioned, including all costs whether paid or not in the case of R. T. Wilson & Co. and that the Planters Bank should assume merely the unpaid costs in the other case. The inference is that the foregoing embraced all that was surrendered or to be surrendered by the Pacific Improvement Co. and that it was clearly contemplated that it should retain the stock.

The City did not see fit, at the hearing below, to call Mr. Cutrer as a witness.

VII.

COMPLAINANT COMES NOT WITH CLEAN HANDS.

The complainant here having come into a court of equity to ask affirmative relief cannot escape the operation of the familiar maxim of quity that "he who comes into a court of equity, must do so with clean hands."

It appears from complainant's answer (p. 32) to the cross bill and elsewhere in the record that the bonds of the City were dated January 15, 1891, and bore interest from date at 6 per cent per annum, payable annually on January 15th. of each year. The settlement by the committee from Clarksdale was made in New York on June 30, 1898, (pp. 68-70). At the time of that settlement there was accrued and unpaid interest on these bonds and past due coupons aggregating $13,366.25.

By the terms of that settlement, the City got rid of every cent of this accrued interest which was hen due them except the certificate of stock here in question.

The City was enabled to make this advantageous settlement how? By repudiating its bonds and standing suit thereon, contesting that suit bitterly for several years, and then, after the validity of the bonds had been judicially declared, disrupting its corporate organization so as to avoid a mandamus. All of this is undisputed in the record. A court

of equity, under such circumstances, will not lend an ear to complainant who seeks the affirmative aid of the court to recover the stock certificates in question.

Clement v. Reid, 9 S. & M. (Miss.) 535.

We, therefore, respectfully ask that the decree of the Mississiippi Supreme Court be reversed and remanded, with directions to dismiss the original and amended bills.

Respectfully submitted,

H. D. MINOR,
CHARLES N. BURCH,
Counsel for Plaintiffs in error and petitioners for certiorari.

BLEWETT LEE, Of counsel.

I certify that today I sent, postpaid, copy of the foregoing brief and argument to Messrs. Maynard & Fitzgerald, counsel for the City of Clarksdale, Clarksdale, Miss.

H. D. MINOR.

Nov. 22, 1920.

APPENDIX

"Sec. 849. Bank notes, bills, or evidences of debt, circulating as money, *or any share or interest in any incorporated company*, belonging to the defendant in execution, may be taken and sold in the same manner as goods and chattels, or applied to the payment of the execution; and the clerk, cashier, or other officer having the custody of the books of the company, shall, upon exhibiting to him the writ of execution, be bound to give to the officer having such writ, a certificate of the number of shares or amount of the interest held by the defendant in such company, and if he shall neglect or refuse to do so, or if he shall wilfully give a false certificate thereof, he shall be liable to the paintiff for double the amount of all damages occasioned by such neglect or false certificates, to be recovered in an action on the case against him. *The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant.*" (Our Italics.)

Revised Code of Miss. (1871), Sec 849.

If it should be held that the Mississippi Code in effect at the time the execution sale took place (December 6, 1897) controls, then the following provision from the Code of 1892 is pertinent::

"Sec. 3471. *Purchasers of title to choose in action, etc.* The purchaser of any choses in action, share, interest, judgement, or decree of the defendant, sold under execution or attachment, shall become the owner thereof, in the

same manner as if it had been regularly assigned to him by the defendant."

Mississippi Code, 1892, Sec. 3471.

———o———

APPENDIX B.

Sec. 449. If the court, upon the return of any writ of execution, for the satisfaction of which any lands, tenements or stock in trade have been sold, shall, after having carefully examined the proceedings of the off-icer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this title, the court shall direct hte clerk to make an entry on the journal, that the court is satisfied of the legality of such sale, and an order that the off'cer make to the purchaser a deed for such lands and tenements; and the officer, on making such sale, may retain the purchase money in his hands, until the court shall have examined his proceedings, as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court."

Compiled Laws of Kansas (1862) Sec. 449.

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No. 15.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, THE MISSISSIPPI VALLEY COMPANY, D. A. SCOTT & E. M. YERGER, PLANTIFFS IN ERROR,

VS.

CITY OF CLARKSDALE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF THE CASE, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR ON THE WHOLE CASE.

MAYNARD, FITZGERALD & VENABLE,
Attorneys for Defendant in Error.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR ON THE WHOLE CASE.

This case is here by writ of error, allowed by the chief justice of the Mississippi Supreme Court, and also by a petition for writ of certiorari, addressed to this court. Separate motions to dismiss the writs of error and certiorari have already been filed, together with briefs thereon. This court, at the October term, 1919, reserved all questions as to the dismissal of the writ of error and writ of certiorari and ordered the case to be set down on its merits for the determination of all questions.

STATEMENT OF THE CASE.

There is involved in this cause the title to two hundred, fifty (250) shares of stock of the Yazoo & Mississippi Valley Railroad Co.

The City of Clarksdale filed its original bill in the Chancery Court of Coahoma County, Mississippi, on the 28th day of February, 1917 (Rec. p. 1) against the Yazoo & Mississippi Valley Railroad Co., alleging that it, the city, was the owner of two hundred fifty (250) shares of stock in the Yazoo & Mississippi Valley Railroad Co., as evidenced by stock certificate No. 147, alleging that the original stock had been issued to it in the L. N. O. & T. Ry. Co., and that later the L. N. O. & T. Ry. Company had consolidated with the Y. & M. V. R. R. Company and that by virtue of said consolidation the city was the owner of the same amount of stock in the consolidated road as it had owned in the L. N. O. & T. Ry. Company, as provided by said articles of consolidation.

The city alleged that this certificate of stock had been lost or destroyed or in some illegal manner done away with, and that although it had tried frequently, to get information as to the extent or value or amount of its share or interest in the consolidated company, it had been unable to procure any information, the railroad company having refused to give any information at all as to the status of the city's claim.

The Y. & M. V. R. R. Company made answer (Rec. p. 15) as did also the Mississippi Valley Company (Rec. p. 38). This latter company is what is known as a holding company, it being the owner of practically all of the stock in the Y. & M. V. R. R. Company, with the exception of the stock owned by the City of Clarksdale. Both the Y. & M. V. R. R. Company and its owner, the Mississippi Valley Company, admitted the city's ownership of stock in the L. N. O. & T. Ry. Company and, by consolidation, in the Y. & M. V. R. R. Company, in the following words, to-wit (Rec. p. 16):

> "Respondent admits that at the date of the consolidation just referred to the complainant was a *bona fide* stockholder in the Louisville, New Orleans & Texas Railway Company and owned at said date two hundred fifty (250) shares of stock in said company, as represented by stock certificate #147 referred to in complainant's bill, and that complainant by virtue of said consolidation became a stockholder in the consolidated corporation, the defendant, the Yazoo & Mississippi Valley Railroad Company, and that complainant owned and was possessed of an interest or share as a stockholder in said consolidated company in the proportion in which the two hundred, fifty shares of stock owned by the complainant in the Louisville, New Orleans & Texas Railway Company, bore to the whole number of shares which had theretofore been issued by the Louisville, New Orleans and Texas Ry. Company and the Yazoo & Mississippi Valley R. R. Company up to the date of said consolidation."

The answers of both said companies then further alleged affirmatively that on December 6, 1897, the in-

terest or share of the City of Clarksdale and its stock certificate evidencing such interest or share in the Yazoo & Mississippi Valley Railroad Co. was sold at public auction by the marshal of the United States Court for the Western Division of the Northern District of Mississippi and purchased by the Pacific Improvement Co. from whom the Mississippi Valley Company, in turn, purchased.

The answer of the Y. & M. V. R. R. Company, according to the practice in the Chancery Court of Mississippi, was asked to be taken and filed and treated as a cross bill (Rec. p. 24) and affirmative relief was prayed for, the court being asked to decree that the city was not a stockholder in the Y. & M. V. R. R. Company and to cancel the certificate of stock for two hundred fifty shares of stock heretofore issued to it in the L. N. O. & T. Ry. Company. This answer and cross bill of the Y. & M. V. R. R. Company was adopted by the Mississippi Valley Company (Rec. p. 38). Thereupon, the City of Clarksdale filed an answer to the cross bill categorically denying the facts alleged in said cross bill and again praying for the relief asked for in the original bill.

The history of the issuance of the original stock certificate need not be gone into because question of title is admitted by the answer of both the Yazoo & Mississippi Valley R. R. Co. and the Mississippi Valley Company, as above stated.

When the case went to trial in the Chancery Court, the railroad company under its claim of title introduced

the executions issued to the Marshal of the United States Court at Oxford as shown by the record and marked exhibits as follows: "H. D. M. #2" (Rec. p. 54), "H. D. M. #3" (also marked by mistake H. D. M. #6, Rec. p. 58), and an *alias fieri facias* as shown by record page 96, *et seq.*, which was also a part of the record of the case left out by the railroad company in the introduction of the balance of the record and introduced by the City of Clarksdale over the objections of the railroad company and admitted by the court as a part of the record.

Objections were made by the City of Clarksdale as shown by the record (pp. 57 and 60) to said writs and the returns as evidencing any title in the Mississippi Valley Company, and the court, reserving all rulings at the time of the introduction of the testimony excluded the evidence upon final hearing as not being sufficient to prove title of said stock in the Mississippi Valley Company, holding that the alleged levy on and sale of said share or interest, as well as the levy on and sale of said stock certificate, was void: that the evidence was inadmissible and insufficient to show the affirmative claim of title; and that the city's title to said stock certificates and the share or interest represented thereby, as admitted in the answer of the railroad company and the Mississippi Valley Company was the true and only title to said stock and certificate.

The only reference to any federal question made in the Chancery Court by plaintiffs in error was made verbally as follows (Rec. p. 107):

"Judge Minor (counsel for Y. & M. V. R. R. Co. and Mississippi Valley Company): I wish to emphasize to Your Honor that in this case the defendants invoke and insist upon the provisions of the United States statutes, to-wit; the Act of 1872, generally known as the Conformity Act, and being Sec. 916 of the Revised Statutes; the Act of March 3, 1893, entitled 'an act to regulate the manner in which property shall be sold under orders and decrees of any United States Court, same being 27 U. S. Stat. L. 751, and that defendants also rely upon the judgment rendered by the United States Circuit Court for the Western Division of the Northern District of Mississippi, sitting at Oxford, Mississippi, rendered in the case of Pacific Improvement Co. against the City or Town of Clarksdale, being #3900 of the law side of said court, and upon executions issued under and in pursuance of said judgment."

Thereupon, after the ruling of the Chancery Court in favor of the City of Clarksdale, the Y. & M. V. R. R. Company and the Mississippi Valley Company took an appeal to the Supreme Court of the State of Mississippi, and pursuant to the practice filed an assignment of errors, setting forth their contentions which will be found commencing at page 112 of the record and ending on page 116 of the record. These assignments number twenty-three. However, only three of them are pertinent here, to-wit, numbers 6, 7 and 19.

The Supreme Court of Misissippi affirmed the decision of the Chancery Court without opinion, the order of affirmation appearing on page 119 of the record. Thereupon, a writ of error was applied for and granted by the chief justice of the Supreme Court of Mississippi

(Rec. p. 119) and assignment of errors made by plaintiffs in error, as shown by record, page 121 to 124, inclusive. These assignments of error number seventeen, but the only ones pertinent are numbers 3, 4, 13, 15 and 16. The burden of each one of these is that the Supreme Court of Mississippi erred in not holding that the applicable statute for the sale of property under execution by the marshal in a law case was the Act of Congress of March 3, 1893 (27 Stat. L. 751). Counsel for plaintiffs in error, recognizing the fact that, because of the enactment of the Act of Congress September 6th, 1916 amending Section 237 of the Judicial Code, he would have no standing in this court on his writ of error, made a belated appeal for a writ of certiorari on or about the last day of time for such action. So that the writ of error, certiorari and trial of the merits are now involved.

Discussion, Writs of Error and Certiorari.

There can be no question that the writ of error in this cause was improvidently granted as is more fully set forth in the motion to dismiss the writ of error and the brief thereon. Under the Act of September 6, 1916, Chapter 448, 39 Stat. L. 726, which amends Section 237 of the Judicial Code, it provides that a final judgment or decree of a state court of last resort in a suit "where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of

or authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity" may be reviewed in the Supreme Court of the United States on writ of error; but if the suit be one "where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is in favor of their validity, or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or where any title, right, privilege or immunity is claimed under the constitution or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity, especially set up or claimed by either party under such constitution, treaty, commission or authority, the judgment or decree can be reviewed in this court only upon writ of certiorari." It cannot be successfully asserted by plaintiffs in error that this is anything else but a "title, right, privilege or immunity claimed under the constitution or statutes or commission held or authority exercised under the United States." Therefore, the writ of error should of course be dismissed.

Certiorari.

As to the writ of certiorari, as will be more fully seen by reference to our motion to dismiss the writ, it

is our contention that this writ is not properly issuable unless the case to be examined is of sufficient national importance to avoid the necessity of conflicting decisions on some matter affecting the interest of the nation; and that the questions here raised are not of the character which this court will consider of any national importance, the questions propounded by counsel of plaintiffs in error having been answered already by this court in numerous decisions.

In fact, the writ of certiorari is an unusual writ and will only be issued by the Supreme Court of the United States in the exercise of sound discretion and is not a matter of right (*Philadelphia, etc., Coal Co.* v. *Gilbert*, 245 U. S. 162). We believe that Congress in the amendment to Section 237 of the judicial code, said amendment being Act of September 6, 1916, Chapter 448, 39 Stat. L. 726, had in mind former decisions of the Supreme Court of the United States in which it was held that the writ of certiorari is one sparingly to be used and will only be exercised when the circumstances of the case show the importance of questions involved.

Forsyth v. *Hammond*, 166 U. S. 506.
Smith v. *Vulcan Iron Works*, 165 U. S. 518.
American Const. Co. v. *Jacksonville, etc.*, 148 U. S. 372.

As the contention throughout, made by counsel both verbally and in writing was there, as here, that the Act of Congress of March 3, 1893 (27 Stat. L. 751) is the controlling statute and as the amendment to the judicial code provided for the review by certiorari, Act Sep-

tember 6, 1916 (39 Stat. L. 726) that the decision of the state court in order to be reviewed even within the discretion of this court must be "in favor of or against the title, right, privilege or immunity, *especially set up or claimed by either party*," we think that in fairness to the Supreme Court of the State of Mississippi it should be held by this court that no right, title, privilege or immunity was *especially set up and claimed in this cause* except the perfectly patent mistake was made by counsel for plaintiffs in error that he contended that the equity statute (28 Stat. L. 751) Act of March 3, 1893, controlled the sale of the marshal instead of 916 of the revised statutes, which provides for the sale by the marshal of property according to the state law. For this reason alone, we do not think that the court should by writ of certiorari examine the decision of the lower court.

On the contrary, the court should hold that patently the Mississippi Supreme Court had only to say that counsel was wrong in his contention of the applicability of the statute and no other real question was presented for decision as his brief admits (see page....of this Brief) he is out of court unless this statute is the applicable one.

Federal Questions Present.

It is true that prior to the enactment of the amendment to Section 237, the judicial code, being the Act of September 6, 1916, Chapter 448, 39 Stat. L. 726, this court had in several instances by writ of error reviewed

cases in which the validity of the levy and execution and the manner of making sale under such executions by marshals of U. S. courts were questioned and attacked; such as the cases of *Avery* v. *Popper*, 179 U. S. 314; *Buck* v. *Colbath*, 3 Wall. 334; *Wayman* v. *Southard*, 10 Wheaton 1. But since the said amendment to the judicial code has been enacted unless a question of great moment and serious import to the nation has been wrongly decided, we do not believe that this court will consider the review by writ of certiorari. However, we cannot but admit that this court has in the decisions cited considered the action of the marshal in levying on and selling property under execution sufficient federal question for examination under writ of error, which at the times of the decisions were a matter of right.

Applicable Statutes.

Counsel contends both the lower courts erred in holding that the applicable laws were the laws of the State of Mississippi, under and by virtue of the conformity statutes of the United States, being Section 916 of the revised statutes, instead of, as claimed by plaintiffs in error, the Act of Congress of March 3, 1893 (27 Stat. L. 751), and the whole argument of plaintiffs in error is built around this alleged mistake and error of the lower courts.

It is just as well to show the reason for counsel's insistence on this point before proceeding further.

It is provided by the applicable state statutes adopted by the Act of Congress, known as the Conformity

Act, and by the United States Court that the property sold under execution must be sold at the front door of the courthouse of the county in which the property is levied on. There is some question raised in the case as to whether the Code of Mississippi of 1871, Section 849, or the Code of Mississippi of 1892, Section 3467, was the applicable state statute adopted under the Conformity Act which will be referred to later on. But as both these statutes require that the property be sold at the front door of the court house in the county, on this particular point it makes no difference which horn of the dilemma plaintiffs in error are caught upon, and strange to say the statute which they contend is applicable, to-wit, the Act of March 3, 1893 (27 Stat. L. 751), also in plain terms, states that property sold under order or decree must be sold "at the courthouse of the county." But the reason for the insistence of counsel is that he has, after great zeal in looking the matter up, come across a line of decisions holding that in sales made under order or decree of the court, the statute fixing the place of sale at the county court house is directory and not mandatory and that sales made under order or decree are not subject to collateral attack. And all of his reasoning and the cases quoted are quoted under the mistaken idea that the applicable statute for sales under executions at law by United States marshals is the Act of March 3, 1893 (27 Stat. L. 751) instead of the Conformity Act of 1872, revised statutes 916.

Question in the Case.

Therefore, there can only be one question in the case with several collateral branches, and for convenience we will use the words of counsel for plaintiffs in error on page 1 of his brief.

The Question: "The right of an execution debtor to make collateral attack on an execution sale of corporate stock by the marshall."

For the convenience of the court, we are attaching as appendices, Section 914 of the Revised Statutes of the United States "Appendix A"; Section 916 of the Revised Statutes of the United States, "Appendix B"; 27 Stat. L. 751, being an act, March 3, 1893, "Appendix C"; applicable sections of the Code of Mississippi of 1871, "Appendix D"; applicable sections of the Code of Mississippi of 1892, "Appendix E". Act of Congress, September 24th, 1789 R. S. 721. "Appendix F."

Act of Congress, March 3, 1893 (27 Stat. L. 751.)

The Act of Congress of March 3, 1893 (27 Stat. L. 751) of course has no application whatever to a sale of property under execution in common law cases, but is merely an act to regulate the manner in which property shall be sold under *order or decree* of any United States Court. This statute is no part of the common law procedure. It is distinguished in all the cases as not being applicable to those at common law. As said by the court in LaFrance Copper Company:

"The Act of March 3, 1893, R. S. 751, seems to relate to judicial sales pursuant to some *order or decree* creating or declaring the right to sell and which right could not be exercised except for that order or decree; sales necessarily authorized and ordered by the court, sales void but for such order or decree."

In re LaFrance Copper Co., 205 Fed. 207.

And in the case of *Lansburg* v. *McCormick*:

"Indeed the court recognizes and distinguishes the case of *Godchaux* v. *Morris*. The cases holding sales made by merely ministerial officers at a place not authorized by statute to be void obviously stand on a different footing."

Lansburg v. *McCormick*, Fed. Rep. C. C. A. 224 Fed. 874.

Every decision quoted by counsel which holds that the place and manner of sale is directory and not mandatory, and is irregular, not void, and not subject to collateral attack, is of the nature named. For instance: The case of *Wheaton* v. *Sexton*, 4 Wheaton 503, does not involve any state statute, but involves a case which came up in the District of Columbia and was construed either according to the congressional statutes of the United States governing the District of Columbia, or Common law.

In the case of *Voorhees* v. *Jackson*, 10 Peters, 474, the property was sold under order and decree of an Ohio Court and confirmed by an Ohio Court, and was not a sale under execution. The case of *Griffith* v. *Bogert*, 18 Howard, 158, is a case in which the property was sold under order of a Missouri court and

was not a sale under execution. The case of *Robertson v. Howard*, 229 U. S. 254, was a case where land was sold, under order and decree of the bankrupt court, and confirmed by that court.

Counsel says that the only case he can find expressing a direct opinion as to the applicability of this statute to an execution is the case of *"In re Britannia Mining Co."* (C. C. A.) 203 Fed. 452. We invite a reading of this case by the court, and ask a special attention be paid to the distinction between a judicial sale under order or decree and a judicial sale by execution. The court in that case saying that the order or decree divested the title and not the sale, it being the reasoning of the court that when the order or decree was made the party was in court and knew what property was to be sold and that the decree of confirmation related back to the time of sale and cured the defects and irregularities. The fact that the court mentions execution has no bearing on this argument, as executions may be issued both at law and in equity.

The above cases show the exact difference between the statute here sought to be made applicable and the existing common law remedy.

The Circuit Court of Appeals has held, however, that even the statute R. S. 751 is mandatory on the courts.

> "This Act (R. S. 751) prescribing the manner in which all real estate or any interest in lands sold under any order or decree of any United States Court shall be sold, etc., is mandatory and divests

> such courts of the discretion which theretofore existed of making sales otherwise than by public auction as therein prescribed, and a sale otherwise made is illegal and void, and does not even bind the purchaser after confirmation."
>
> *Cumberland Lmbr. Co. v. Tunis Lmbr. Co.*, 171 Fed. Rep. 352.

In our opinion the court was clearly correct in the decision and we believe further that (27 St. L. 751) was passed to prevent equity courts from decreeing sales to be made at any other place than the county courthouse as obviously a hardship would be caused by selling property which might be valuable and desirable at home but have no market elsewhere.

Counsel quotes a number of cases in which the court calls an execution sale a "judicial sale." As an abstract definition, this is correct, and we have no quarrel with the statement; but we think that we have made the proper distinction between a judicial sale made under order or decree and a judicial sale made by a ministerial officer under execution. The case of the *Nevada Nickle Syndicate* v. *National, etc.*, which is also quoted by counsel, recognizes the same distinction. At page 396 of that report the court says:

> "A void act has no legal existence—no lapse of time could make it valid." And the court holds that the case under consideration by it shows a sale to have been cured by confirmation of the decree or order making the sale, saying—"The sale is not absolute until confirmed. The order of confirmation gives the judicial sanction of the court and when made it relates back to the time of sale and

cures all defects and irregularities except want of jurisdiction and fraud."

Nevada Nickle Syndicate v. *National*, etc., 103 Fed. Rep. 396.

State Statutes Applicable in Common Law Process.

It is elementary law that the Federal System of administering common law does not provide the form, manner or means of executing its own judgments. Sections 914 and 916 of the Revised Statutes, as passed by the Act of Congress, June 1, 1872, control the practice, pleadings and forms or modes of proceeding in civil cases other than equity and admiralty cases.

Therefore, the only way to enforce one's judgment in the Federal Court is to proceed according to state practice.

"No form of process was provided by the courts of the United States by any Act of Congress now in force."

Chamberlain v. *Mensing*, 47 Fed. 435

"It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress under the Constitution as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature and form of Writs of Execution for the enforcement of judgment, but also as to the proceedings thereon."

Ex parte Boyd, 105 U. S. 647 (26 L. Ed. U. S. 1200).

It will be noticed that the law itself in section 914, R. S. especially exempts from the action of the statute

causes in equity and admiralty, which are controlled of course by the rules promulgated by the United States Supreme Court and by the Acts of Congress, one of which is the Statute of March 3, 1893 (27 Stat. L. 751).

Even attachment in common law cases is controlled entirely by the state laws as provided by section 915 of the Revised Statutes.

> "The Federal Courts are not governed by any separate attachment law but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held."
>
> *Perez* v. *Fernandez*, 202 U. S. 80 (50 L. Ed. 942).

> "But the statute of 1872 is peremptory, and whatever belongs to the three categories, practice, pleading and forms and modes or proceeding must conform to the state law and practice of the state court, except where Congress itself has legislated upon a particular subject and prescribed the rule. Then, the act of Congress is to be followed in preference to the laws of the state."
>
> *Amy* v. *City of Watertown*, 130 U. S. 301 (32 L. Ed. 947).

Counsel for appellants quotes Justice Story in *Beers* v. *Haughton* (9 Peters 359), as saying that:

> "State laws have no operation, *proprio vigore* upon the process or proceedings in the courts of the United States. * * * The whole efficacy of such laws in the courts of the United States depends upon the enactments of Congress."

However, counsel may regard this slight quotation as upholding his contention that state laws are not con-

trolling in the courts of the United States, the court itself did not use the words mentioned in the sense as interpreted by him and Justice Story continued immediately following the quotation made by counsel as follows:

> "So far as they (state laws) are adopted by Congress they are obligatory. * * * Congress may adopt such state laws directly by substantive argument or they may confide the authority to adopt them to the courts of the United States."

And he proceeds to say that the Act of 1789 and the Act of 1792, especially adopted the forms of writs and modes of process of the state courts with this provision, that they were subject to such alterations and additions as the courts respectively should in their discretion deem expedient. The attention of the court is called to the fact that the present statute, section 914, contains the significant words not contained in former acts, "any rule of the court to the contrary notwithstanding." We also call the court's attention to the discussion of *the Beers* v. *Haughton* case, in the case of *Ward* v. *Chamberlain* (2 Black, 430) (17 L. Ed. 319); wherein, discussing the question as to whether or not the court may adopt rules, make judgments or decrees for the payment of money a lien on land, where no such charge is created by state law, or to displace any such right, where the same is conferred or recognized by Act of Congress, Justice Clifford says:

> "Remarks are to be found in the opinion of the court, in *Beers* v. *Haughton*, 9 Peters, 359,

which gives some countenance to that theory, but the remarks were not necessary to the adjudication of the matter in controversy and evidently should be understood as referring to the examples previously mentioned in the opinion of the court where process had been modified to conform to the laws adopted by the rule of court. Congress, say the court, may adopt such state laws directly or by substantive enactment or they may confide the authority to adopt them to the Courts of the United States, and the judge who delivered the opinion in enforcing the proposition went on to say that the courts may by their rules not only alter the forms but the effect and operation of process, both mesne and final, so that it may reach property not before liable, or may exempt property previously subject to such process.

"Explained as above, the remarks are perhaps without objection, but it cannot for a moment be admitted that any rule adopted by this court, merely as such can enlarge, diminish, or vary the operation and effect of mesne or final process upon the property of the debtor in respect to the matter under consideration."

No doubt, this announcement is founded upon the principle that as Congress has the sole authority under our government to make laws for the United States Courts and likewise the authority to delegate to the United States Courts the authority to adopt state laws for their guidance, when once such state laws are adopted either by enactment of Congress or by the United States Court under its delegated authority, they can no more be enlarged or varied by rule of court than the rule of court could enlarge or vary the statutes or constitution of the United States. Of course, the laws of

the state, as such, have no operation, *proprio vigore*, on the courts of the United States, but only acquire their efficacy and operation through the adoption by Congress for the United States Court.

Section 916 of the Revised Statutes of the United States provides that the party recovering a judgment in any common law cause in the Circuit or District Court shall be entitled to *similar remedies* upon the same by execution or otherwise to reach the property of the judgment debtor as are now provided in like causes by the laws of the state in which such court is held, or by such law as is hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may from time to time by general rules adopt such state laws as may hereafter be in force in such states in regard to remedies for judgments by execution or otherwise.

It is contended by counsel for plaintiff in error as an explanation that the statute of the state need not be strictly followed, that the words "similar remedies" do not mean state laws, then in force at the time of the enactment of this statute, or thereafter adopted by Federal Courts, but mean remedies something like or of a similar nature. However, this court and the other Federal Courts seem to differ from counsel in their opinion about this.

Of course, the same remedies cannot be used, because the word "sheriff" must be deleted and the word "marshall" inserted and the state officers of course will not act for the Federal Court. But these statutes

have already been construed as meaning the state laws are in force and that the remedies are the same with only such differences as may be actually necessary to allow the United States officers to perform the duties set forth to be performed by sheriffs and other officers under state law. And it certainly does not mean that the marshal may use his own judgment just so it is *similar to state law*. It was contended in the case of *Wayman* v. *Southard*, 10 Wheat. 1, that state laws would not control, but Justice Marshal in that case set forth very clearly that they did control in every respect except where they conflicted with the Constitution of the United States or its laws as written.

And as to the question as to whether or not under the Act of 1792 which was an Act to regulate process in the Courts of the United States, under which Act the United States Courts had the right to make such alterations and additions in proceeding under the state laws as might in their discretion be deemed expedient (it will be noted that no such right is given now but that the court can only adopt as its rules state laws and that state laws are in force, "any rule of the court to the contrary notwithstanding,") he decided that the court by general rule even though not in writing might prevent any state Act enacted after the Conformity Act from being effective. But he did not rule that the court could change the state law, already adopted.

The case of *Wayman* v. *Southard*, 10 Wheat. 1 (6 L. Ed. 253) is quoted and relied on by counsel for plaintiffs in error in his argument that the United

States Courts are not controlled by state statutes. He quotes that part of Chief Justice Marshal's opinion in which he said that it was extravagant to maintain that the practice of Federal Courts and the conduct of their officers can be indirectly regulated by the state legislature by an Act professing to regulate the proceeding of state courts and the conduct of the state officers who executed the process of those courts.

This case in our opinion is conclusively against plaintiffs in error. The opinion is clear and understandable and sets down the rule that the United States Courts are governed by the state laws because of their adoption by the Act of 1789 and Conformity Acts following thereafter, except when, as provided by the Conformity Act itself, the state law was changed by rule of the court authorized by Congress or when they were directly against and in violation of the Constitution and laws of the United States.

That case involved the question whether or not the state law passed after the Conformity Act requiring the officer to endorse on the back of the writ that notes of the Bank of Kentucky would be received in payment and requiring the officer to accept a replevin bond in satisfaction of the execution. Justice Marshal held that these two regulations were against the laws and Constitution of the United States and that besides that the court had adopted a rule otherwise, which though not adopted in writing was by general adoption the rule of the court, not to accept replevin bond or to require the

marshal to write on the back of the execution that notes of the Bank of Kentucky would be received.

However, Justice Marshal does say that the Conformity Act not only prescribes the form of writs and executions, but is "applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination." And further says: "It has not, we believe, been doubted that this sentence was intended to regulate the whole course of proceeding." And further: "It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of the proceedings in the suit."

Justice Marshal further states that in a former case (being that of *Palmer* v. *Allen*, 7 Cranch 550) it might be considered at first sight as supporting the opinion of the court that the Acts for regulating process in the Courts of the United States do not adopt the laws of the several states, but upon proceeding to examine the case it is clearly shown that the decision is founded on the fact that a general rule of the court provided that the marshal did not have to obtain a mitimus before committing the person served to jail although the state law so provided; this state law having been passed after the Conformity Act and a rule contrary thereto prescribed by the court; and that also an Act of Congress applied, which required the marshal to commit such prisoner without mitimus. Of course the Act of Congress would supersede the state statute.

What state statutes applicable; whether Code 1871, or Code 1892.

Having demonstrated that the state statutes are applicable when execution is issued in the Federal Court by virtue of their adoption either by Act of Congress or of the Federal Court, we propose now to take up the question as to whether or not the state statute, which was in force in 1872 on June 1st, when the Judicial Code was adopted, and R. S. 914-15-16 became effective, which state statute was the Code of 1871, of the State of Mississippi (Appendix D) or the statutes, being Code of Mississippi of 1892 (Appendix E) which were in force at the time the proceedings under execution were taken.

It was therefore incumbent upon the marshal to proceed under the state statutes, and the only way he could proceed. The statute in force at the time of the issuance of the execution and alleged sale of the property on December 6, 1897, in the State of Mississippi was Section 3467-3484 of the Code of Mississippi of 1892 (see Appendix E). The statute in force at the date of the adoption of the Conformity Act and Sections 914 and 916 of the Revised Statutes, in the State of Mississippi was Section 849-846 of the Code of 1871 and under counsel's argument the question arises which of the state statutes was applicable and binding on the marshal in making the sale of property under execution in common law cases.

It is true that Justice Marshal in the case of *Wayman* v. *Southard*, 10 Wheat. 1, says that the Conform-

ity Act established the state statutes as controlling at the time of the passage of the Conformity Act and did not adopt such state statutes as might be passed thereafter because of the wording of that statute, which says that the court might adopt such rules from time to time as it saw fit, but we call the court's attention to the statutes now in force, Section 914, R. S., which contain the significant words, "any rule of the court to the contrary notwithstanding." Therefore, we take the position that the court could not pass a rule to the contrary of the state laws. But it will be said that if the court passed no rule at all, the statutes of the state in force at the time of the adoption of the Conformity Act of June 1, 1872, would control unless the United States Court, by written rule, adopted later statutes of the State of Mississippi, to-wit: Code of 1892. This is not true for as clearly set forth by Justice Marshal in the *Wayman* v. *Southard* case (10 Wheat. 1), a general rule of the court need not be in writing. And in his explanation of the *Palmer* v. *Allen* case (7 Cranch 550), he says (still quoting from *Wayman* v. *Southard*): that a general rule of court might be understood and yet not be in writing, but just be the general practice of the court:

> "Uniform course of that court from its first establishment dispenses with this mitimus and may be considered as the alteration (of the state law or practice) in this particular, which the court was authorized by law to make (by general rule)."

In other words, the point we desire to make is this: That, as stated in the case of *Logan* v. *Goodwin*:

"When parties seek attachments, garnishments, executions, provisional remedies of various kinds in the Courts of the United States, it is not the habit of counsel or of the court to search the statutes of a quarter of a century ago and to conform the proceedings of the Federal Courts to those then in force at the time they act, and a general and uniform practice becomes a general and universal rule of the court, and in the absence of convincing evidence to the contrary, the principle in the appellate court is that the remedial statutes in force in the states at the time when the proceedings were taken in the Federal Courts had been adopted by those courts, either by written rule or by general practice."

Logan v. *Goodwin*, 104 Fed. 409.

Also, "this Section (915-916 R. S.) does not require that the general rules adopted in state laws relating to remedies by attachment passed subsequently to that Act shall be in writing."

Citizens Bank v. *Farwell*, 56 Fed. 570; 6 C. C. A. 24.

It is desired that the court shall notice that the returns of the officer on both H. D. M. No. 2 (Rec. 54) and H. D. M. No. 3 (or No. 6) (Rec. 58) and the *alias fifa* (Rec. 96) are written exactly in the form required by the Code of 1892, Section 3467. Therefore, we presume that not only there is no convincing proof to the contrary that the marshal was acting under any other law than that of the Code of Mississippi of 1892, but that this is convincing and overwhelming evidence that it was the custom of the court at that time to use the statute in force at the time the person acted as being the means to carry out the levy and sale of property

under execution in the United States Court, and therefore constituted adoption by the court of the Code of 1892, Section 3467-3484.

We therefore respectfully submit that Section 849-846 of the Code of Mississippi, 1871 (Appendix "D"), is not applicable but that the Section acted under by the marshal was Section 3467-3484 of the Code of Mississippi of 1892 (Appendix "E"), which was the applicable statute.

If, as counsel for plaintiffs in error contends, the Code of 1871, of the State of Mississippi, Section 849-846 (Appendix "D") was applicable, this places him in a more embarrassing position than if he took the position the Code of 1892 was applicable, because the return made by the officer shows conclusively that the Code of 1892, Section 3467, was what he was acting under, for the return was made in accordance with that Section. Also, the record showing the answer of the Y. M. & V. R. R. Company (Rec. p. 98) commences with the words: "Comes the Yazoo & Mississippi Valley Railroad Company, said company being pretended to have been served in said cause with a notice and demand under Section 3467 of the Annotated Code of 1892 and protesting, etc."

The Act of June 1, 1872, Chapter 255, R. S. 914, added the words "any rule of the court to the contrary notwithstanding" and we believe that congress had in mind in passing this Act to prevent the multiplicity of questions which were arising from time to time in the Supreme Court of the United States, with reference to

the rules adopted by the Circuit and District Courts, changing and modifying for their own convenience the laws of the states, either by general or specific rules.

However, be that as it may, we will demonstrate later on in this brief that under either the Code of 1871 of Mississippi or the Code of 1892 of Mississippi, the levy and sale, as alleged, is absolutely void and subject to collateral attack.

State Decisions.

We respectfully submit that this court and the Federal Courts in general have conceded uniformly that where the state statutes under the Conformity Act are used by the Federal Courts as a part of their procedure, whether adopted by the Act of Congress or the rules of the Federal Court under those Acts, they constitute the law of the case and the decisions of the state courts construing their own statutes are binding upon the Federal Court even though it might be said that such state statutes when adopted by the Federal Courts become *pro hac* Federal statutes.

No better statement of the reason for this salutary rule can be stated than that announced by Chief Justice Marshall in the case of *Elmendorf* v. *Taylor*, 10 Wheat. p. 153 (6. L. Ed. 292) wherein he says:

> "This court has uniformly professed its disposition in cases depending on the laws of a particular state to adopt the construction which the courts of the state have given to those laws. This course is founded on a principle supposed to be universally recognized, that the judicial depart-

ment of every government, where such department exists is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true unless they come in conflict with the Constitution, laws or treaties of the United States. If then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

"The Federal Courts show their respect for and deference to the settled decisions of the high court of the state, so far as to follow them blindly, as it were, in two well recognized classes of cases. One class is where the matter decided relates to the interpretation or validity of the written or statutory laws of the state, if the Federal Constitution is not involved."

U. S. Savings, etc. Co. v. Harris, 113 Fed. 27.

"A fixed and received construction by state courts of their respective statute laws makes in fact a part of the statute law of the country, however the court may doubt the propriety of that con-

struction, and it should be followed by the Federal Courts."

Shelby v. *Guy*, 11 Wheaton, 361 (6 U. S. L. Ed. 495).

Chief Justice Marshall while sitting in Circuit expressed his reluctance to even construe state statutes where there had been no construction theretofore by the state courts. He said:

"It is always with much reluctance that I break away in expounding the statute of the state, for the exposition of the Acts of every legislature is, I think, the peculiar and appropriate duty of the tribunal created by that Legislature."

Coats v. *Muse*, (1822) 1 Brock, 539 (5 Fed. cases #2,917).

"In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look not only at their constitution and statutes, but at the decisions of their highest courts, giving construction to them * * * If there be any inconsistency as to the opinion of these courts, the general rule is we follow the latest settled adjudication in preference to the earlier ones."

Wade v. *Travis Co.*, 174 U. S. 499 (43 L. Ed. 1060).

Revised statutes of the United States, Section 721 (laws of the states, rules of decision):

"The laws of the several states except where the constitution, treaties or statutes of the United States otherwise require, or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply."

"Whether the sale would have been void without the seal, and whether the amendment was rightfully made, were questions of Wisconsin law, and this and all other such questions were decided in favor of the sale by the Wisconsin court on motion to set aside the sale. That decision must control us as to all that concerns the regularity of these proceedings."

McGoon v. *Scales*, 9 Wall. 23 (19 L. Ed. 545).
Bauserman v. *Blunt*, 147 U. S. 647 (37 L. Ed. 316).

"Where the construction given by the highest court of the state to the Constitution or a statute of the state has been uniform and is settled, it is binding on the courts of the United States as a rule of decision."

Webster v. *Cooper*, 14 Howard 489 (14 L. Ed. 510).

Smith v. *Cockrill*, 6 Wall. 756 (18 L. Ed. 973).

"As a rule, the Supreme Court (of the United States) treats the construction which the highest court of a state has given to a statute of that state as a part of the statute."

Douglass v. *Pike County*, 101 U. S. 677 (25 L. Ed. 968).

Validity of Judgment and Writ.

It is conceded that the judgment in the case upon which execution was issued was valid.

The writs and levy and sale thereunder are all questioned and declared to be void and of no effect and subject to collateral attack, for the reasons hereinafter shown.

Plaintiffs in error claim title under a sale made under execution. There were three executions issued and the return on one of the executions speaks of a *venditioni exponas* (Rec. p. 56) though what became of this *vendi* is lost in doubt. These writs were as follows: "H. D. M. No. 2," commencing at page 54 of the record and ending at page 57; writ "H. D. M. No. 3," which by some mistake was also marked "H. D. M. No. 6," set out in full commencing at page 58 and ending on page 61; the third writ being an *alias fi. fa.* as shown by the record at page 96, ending on page 100.

To writ "H. D. M. #2" were interposed the following objections:

> "*Mr. FitzGerald.* The complainant makes the following objections: First, that the return on the said execution does not show a proper levy; second, that the return on its face shows that the property levied on was sold at the wrong time and the wrong place and in an improper manner. Third, that the return attempts to show the execution of a writ of *venditioni exponas* on which paper alone the return could be made, and because the return is truly and absolutely void as to the actual sale and delivery of any of the share, interest or stock of the City of Clarksdale in and to the Louisville, New Orleans & Texas Railway Company; because the return is not in conformity with the statutes of the State of Mississippi in regard to the levy and sale of such property in any respect; because the return does not show any authority to make such levy as is alleged to have been made, or to make such a sale as is attempted to be shown by the return" (Rec. 57).

To writ "H. D. M. No. 3" (or #6) (Rec. p. 58 to p. 61 incl.), the following objections were interposed:

> "Because the paper is incompetent, immaterial and irrelevant; because the return does not show any sale; because the return is made, or proposed to be made, by a deputy United States marshal of the Southern District of Mississippi, and no sale is alleged to have been made by him, because no levy is shown by the execution as required by the statutes of the State of Mississippi, or the law in force at that time as acknowledged and acted upon by the United States courts in the Districts of Mississippi; because the return is void except as a return *'nulla bona'* and shows on its face that no action was taken by the officer" (Rec. 60).

The other writ which was a part of the record and introduced as "H. D. M. No. 4" (Rec. p. 96) was immediately withdrawn by counsel for plaintiffs in error but introduced for purposes of showing the complete voidness for the whole proceedings by counsel for defendant in error (see Rec. p. 96).

At the risk of being deemed prolix by the court, we think it expedient to call the court's special attention to the following points as made in the objections and to elaborate somewhat on them.

Levy.

In the return on writ "H. D. M. No. 2" (Rec. p. 54), there is no levy shown, because this is not the manner in which shares or stock may be levied upon.

At common law stock in corporation was inchoate and could not be levied upon, and it is only by statutory

authority that this can now be done, but the statute must be literally and strictly followed.

17 Cyc. pp. 944-45.
Cook on Corporations, Sec. 480, *et seq.* Vol. 2, 6th Edition.
Jellenik v. *Huron Copper*, 177 U. S. 1 (44 L. Ed. 647).

The section of the statutes of Mississippi under which this levy was attempted to be made was Section 3467 of the Code of 1892 (Appendix E). It is evident that the marshal had in mind the provisions of this section, for in his return on one of the void writs, at page 59 of the record, he says:

> "Received, etc., and executed same on the 1st day of December, 1897, by levying upon the stock and shares or interest of the defendant in the Louisville, New Orleans & Texas Railway Company, and in the Yazoo & Mississippi Valley Railroad Company, by going to the office of said companies in Jackson, Miss., and there declaring that I levied upon said stock, shares or interest of the City or Town of Clarksdale, at the suit of the Pacific Improvement Company; and I then demanded of Geo. R. Gordin, the agent of such corporation, a statement in writing, under oath, of the amount of the City or Town of Clarksdale stock, the number of shares, etc."

Further evidence that this code section was in the marshal's mind is shown by the fact of his return on the execution, page 59 of the record, which is as follows:

> "Received at Jackson August 13, 1897, and executed same day by going to the office of the

> Yazoo Mississippi Valley Railroad Company in Jackson and there declaring that I attached as levied upon the stock, shares and interest of the defendant; further by delivering to George Gordon, agent of the said Yazoo & Mississippi Valley Railroad Company, a true copy of this writ, and demanding of him, by instrument in writing delivered to him, a statement in writing under oath, of the amount of the defendant's stock, the number of its shares, and extent of its interest in said railroad company."

The further fact that the return on the execution referred to herein as writ "H. D. M. No. 2," which return is shown on page 56 of the record, while it shows no levy, does attempt to make sale of the interest, share or stock of the city by said return.

To strengthen and clinch beyond dispute the fact that the levy and sale were all attempted to be made under the Code of 1892, we refer to the answer of the Yazoo & Mississippi Valley Railroad Co. shown on pages 62 to 63, inclusive, of the record, which commences with the following significant statement:

> "Comes the Yazoo & Mississippi Valley Railroad Company, said company being pretended to have been served in said cause with a notice and demand under Section 3467 of the Annotated Code of 1892—etc."

It is not shown that any levy was ever made upon the real share or interest of the city in the consolidated railroad, but the interests of the city, as distinguished from the stock certificate, was attempted to be sold by virtue of a mythical writ of *venditioni exponas*. There is no *venditioni exponas* shown by the record. The mar-

shal's certificate, at page 89 of the record, shows no *venditioni exponas* ever received or returned in his office during the dates mentioned. The clerk's certificate, at page 92 of the record, shows the hasty issuance of a *vendi* on December 3rd, 1897, however, as the attempted sale was made on the 6th of December, surely the plaintiffs in error will not claim title under this *vendi*, just three days old at the date of sale, when publication of notice is alleged to have been made for ten days.

Of course a *venditioni exponas* could only be issued upon the return of an execution showing property unsold remaining in the hands of the officer after the return day of the execution had expired.

Code, 1892, Sections 3492, 3493 (Appendix "E").

Code, 1871, Section 848 (Appendix "D").

It is true also that a second execution could not issue unless the first had not been served and had not been returned and had not been executed.

Section 3461, Code, 1892 (Appendix "E").
Section 840, Code, 1871 (Appendix "D").

A return on an execution could not be made as a return on a *venditioni exponas*. This is certainly not the law of Mississippi. The "return" of a paper means the report in writing of the action of the officer in regard to the paper made on the back thereof of the authority by which he acts.

Beall v. *Shattuck*, 53 Miss. 361.

Not only was there no return on any *venditioni exponas* but the *venditioni exponas* which appears by the clerk's docket to have been issued (Record, page 92), was issued only three days before the day of court to which the return was made. This is absolutely null and void.

Harris v. *West*, 25 Miss. 156.

It is admitted that the pretended levy of the marshal made on the certificate itself was made in Clarksdale. This is also shown by the marshal's return docket (Record, pages 93-94, top p. 94). Any levy made in conformity with Section 3467, Code 1892, or Section 849, Code 1871, must have been made under writ (Record page 96), which was issued on the 27th day of November, 1897, less than fifteen days before the term of court to which it was returnable, to-wit, the first Monday in December. Such a writ is void on its face.

Harris v. *West*, 25 Miss. 156.
Code, 1892, Section 3460.
Code, 1871, Section 839.

and of course no levy could have been made under such a writ, or sale either for that matter, though the writ itself does not show a sale.

Writ "H. D. M. No. 3" (Rec. p. 58) does not show a proper levy, and as there is no return thereon, nor any pretended sale made thereunder, we do not suppose that it is possible it can have any connection with the asserted title. The pretended levy thereunder was made at Jackson, Mississippi.

In discussing the levy under these executions, we deem it proper at this juncture to again call the court's

attention to the sharp difference between the real interests, share or ownership of a person in a corporation and the stock certificate or indicia of ownership of the said share or interest. Section 3467 of the Code of 1892, especially sharply draws this distinction, and does not provide for the sale of the stock certificate at all. The distinction is plainly drawn in the case of

Jellenik v. *Huron, etc.*, 177 U. S. 1 (44 L. Ed. 647).

Simpson v. *Jersey City, etc*, 55 L. R. A. 797 and notes.

Especially note to above pages 802-807.

The Code of 1871, Section 849 also makes this distinction for it requires that demand be made upon the company, in which the debtor is supposed to own a share or interest, for the amount and value of said share or interest belonging to the debtor. Which provision precludes the idea that the stock certificate itself could be sold as such.

"Stock certificates are mere evidence of the ownership of shares, indicia of interests in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy on the stock itself without more."

Young v. *South, etc., Iron Co.* 85 Tenn. 189 (2nd S. W. 202).

"Stock may be attached, but the certificate cannot be."

Winslow v. *Fletcher*, 55 Am. Rep. 122.

Third, there could have been no advertisement at all under said *vendi*.

If it be contended that a sale was made under Writ "H. D. M. No. 2," as shown by the return at page 54 of the record, claiming the same to be an execution, such attempted sale is utterly and absolutely void; first, because no valid levy is shown; second, because the sale of the simple certificate No. 147, which is the mere indica of ownership of the share or interest of the defendant in error, would not serve to pass title to the real share or interest of the city in said railroad company. Third, because the sale was made in front of the Federal Courthouse at Oxford, Mississippi, instead of in front of the county courthouse of Coahoma County. It will be remembered by the court that it is conceded that the stock certificate No. 147 was levied on at Clarksdale, Mississippi, August 14, 1897, and in this regard also see the Marshal's return docket (Rec. p. 93) showing--

> "Return (showing when, where, upon whom, how and by whom service was made) served Aug. 14, 1897 at Clarksdale on W. D. Chappman by delivering to him in person a true copy of the same. Signed, J. W. Cooke, office deputy, and taking into custody one certificate of stock for 250 shares of $100.00 each in the Louisville, New Orleans & Texas Ry. Company. Signed J. W. Cooke."

It will also be remembered that the return on Writs "H. D. M. No. 3" (Rec. p. 58), the other writ (Record p. 96), shows that whatever invalid levy was attempted by them was made at Jackson, Mississippi.

Now the sale of the real share or interest of the appellee could only have been made in front of the courthouse of the County of Hindes, Jackson, Mississippi, and the sale of stock certificate No. 147 could only have been made in front of the courthouse of Coahoma County at Clarksdale, Mississippi even if any valid levy had been made on either one, which is here denied.

We here refer to both the Code of 1892 Sec. 3484 and the provisions of the Code of 1871 (Sec. 846) with reference to the sale of property under execution (Appendices "E" and "D").

We see no consolation for plaintiffs in error in either statute, and believe that the only reason for his strange preference for the statute of 1871 is to try and make his pretended sale of the stock certificate carry with it also the real share, interest or stock of the appellee as distinguished from the certificate itself, there being no especial provision in the Code of 1871 as to how levy should be made on such property. This, in our opinion, however, would be as impossible under one statute as the other.

But now to the question of the sale being made at the wrong place and so being utterly void.

Be it however under either of the statutes, Code, 1871, Sec. 846 (Appendix "D") or Code, 1892, Sec. 3484 (Appendix "E"), the sale was at the wrong place and utterly and absolutely void. This counsel for plaintiffs in error candidly admitted on page 25 of his brief in the Supreme Court of the State of Mississippi in the following words:

"The execution sale here involved was made not at the county courthouse, but at the Federal courthouse, and we are obliged to concede that in two cases decided by this court, it has been held that the statutory requirements as to the place of sale, is mandatory and that a sale made elsewhere than at the county courthouse is void."

Koch v. *Bridges*, 45 Miss. 247.
Jones v. *Rogers*, 85 Miss. 802.

And on page 26 of the same brief, beginning with the second paragraph "as both statutes (speaking of Code 1892 and Code 1871) require a sale at the courthouse of the county, it would seem to make little different which law is applicable." Counsel for plaintiffs in error later on remarks naively that the Congress of the United States may have meant "Federal Courthouse" when it said "County Courthouse." Counsel's reasoning, we suppose, is that the Federal Courthouse being in some county, it might be called a county courthouse. He might as well have remarked as section 3484, Code 1892, provided that cattle, sheep or *stock*, other than horses and mules, might be sold at any public place, the word *stock* referred to stock in corporations, as it is certainly "other than horses and mules."

Having exhausted the state laws and their application, and twisted them in every conceivable shape and construction, plaintiffs in error, as a last resort, flee between the horns of the altar of the Federal Equity Procedure Statute, and say: "As both statutes require a sale at the courthouse of the county, it would seem to make little difference which law is applicable. The

point we are after is that in either event the interpretation and effect of those laws is a Federal question and solvable by the Federal Decisions. Act of Congress of March 3rd, 1893 controls. It is our view that this execution sale, so far as the *place of sale* is concerned, is controlled by the Act of Congress of March 3rd, 1893 (29 Stat. L. 751)."

The court made no order or decree in this case, as shown by the clerk's certificate (Rec. p. 93), so if the above statute applies, which of course it does not, the sale would still have had to be made at the county courthouse.

A sale made by the Marshal of the United States of personal property or real estate in front of the Federal Court building is void and subject to collateral attack.

Kock v. *Bridges*, 45 Miss. 247.
Jones v. *Rogers*, 85 Miss. 802.
Moody v. *Moeller*, 13 Am. St. Rep. 839.
Sinclair v. *Stanley*, 64 Tex. p. 67.
Smith v. *Cockrill*, 6 Wall. 756 (18 L. Ed. 973).

"Under the law of the United States relating to the sales of property taken under execution in common law cases pending in the Circuit Court, defendant in execution is entitled to have the sale of lands seized under execution made at the door of the courthouse of the county in which it is situated."

Borneman v. *Norris*, 47 Fed. Rep. 438.

In the latter case, the motion came up in the Circuit Court below on a motion to quash the execution and

the court granted the motion and at the same time announced the above doctrine. Counsel immediately states in view of this that the only way to have voided this sale was to make a motion to quash the execution, but in view of the other cases cited, we do not believe his position is sound.

> "Where however a sale is void and not merely voidable it may be attacked in collateral proceedings."
>
> 17 Cyc. 1286.
> *Harper* v. *Hill*, 35 Miss. 63.
> *Koch* v. *Bridges*, 45 Miss. 247.
> *Jones* v. *Rogers*, 85 Miss. 802.
> *Smith* v. *Cockrill*, 6 Wall. 756 (18 L. Ed 973).
> 2nd Freeman on Executions, 3rd Ed., Sec. 289

Title of the City.

Having already quoted in the statement of the case admission of the plaintiffs in error of the title of the city to the stock in question, which appears on page 16 of the record (second paragraph on the page) there of course can be no force in counsel's argument that the city had no title. Anyway, this question is concluded by the decision of the Supreme Court of Mississippi as the question is not a Federal one. It is clear that counsel is again laboring under a misapprehension when he states the original bill was a bill to remove clouds from title. The plaintiff in error asserted as an affirmative defense certain chain of title to the stock in question and having asserted an affirmative defense, the burden of proof was on him to make his assertion good.

Archer v. *Helm*, 70 Miss. 874.
Cain v. *Moyse*, 71 Miss. 653.
Miller v. *Lamar*, 43 Miss. 383.
Dyer v. *Williams*, 62 Miss. 302.
Parmele v. *McGinty*, 52 Miss. 475.

We realize, of course, that as to the question of the title of the city this court is concluded because even it were ruled by this court that a Federal question was involved only the particular Federal question would be passed on, all other questions being concluded; but as counsel contends so strenuously on this point, we thought it just as well to relieve his mind as well as our own on this matter.

Questions Already Concluded.

The decision of the Supreme Court of Mississippi in this cause concludes this court, in our opinion, as to the question of laches, failure to pursue other remedies, whether or not the city comes with clean hands, and the statute of limitations. However, as counsel is so insistent, at the risk of boring the court, we will call the court's attention to the following decisions, with very little comment:

> "Nothing is better settled under the decisions of the State of Mississippi than that mere laches or lapse of time less than the period prescribed by the statute of limitations will not work a bar to right of recovery."

Anding v. *Davis*, 38 Miss. 574.
Westbrooks v. *Munger*, 61 Miss. 329.
Taylor v. *Chickasaw Co.*, 70 Miss. 87.
Hill v. *Nash*, 73 Miss. S. 49.

"There can be no equitable estoppel except by direct misrepresentation."

Thomas v. *Romain*, 82 Miss. 256.
Stayton v. *Bryant*, 55 Miss. 261.
Hill v. *Nash*, 73 Miss. 849.

The seeming inaction of the city was caused by the refusal of defendant company to give it any information although often requested, in reference to the ownership and whereabouts of the city's share and interest in the said company and its stock certificate.

The records show that when plaintiff in error, the Mississippi Valley Company, bought this stock certificate No. 147, there was written on the back of it the marshal's return showing an illegal and unlawful sale. This was full knowledge of the irregularities thereof and where both parties have access to the record and notice of the irregularities, there can be no estoppel.

Bryant v. *Va. Coal Co.*, 93 U. S. 326-337 (23 L. Ed. 929).

3rd Ed. Pomeroy's Equity Juris. Sec. 606-608.

As to the Statute of Limitations, the Constitution of Mississippi of 1890, Section 104 is as follows:

"*Section* 104. Statute of Limitations in civil causes shall not run against the state, or any subdivision, or municipal corporation thereof."

Constitution, 1890, Section 104.
Wayne Co. v. *Helton*, 79 Miss. 122.
Warren Co. v. *Lamkin*, 93 Miss. 123.
Lexington v. *Hoskins*, 96 Miss. 163.

The fact that the city did not hold this stock for public use or in its governmental capacity does not change the applicability of Section 104 of the Constitution, as said by the court in *Warren Co.* v. *Lamkin*:

> "The wholesome doctrine that, except in cases for public user, the statute of limitations would run against counties and cities was done away with by the Constitution of 1890. The convention in that case was reactionary and went back to the old despotic doctrine forgetting even the fact that in England sixty years would bar the king (3 Black. Com. 307). Here we have it now embodied in our written Constitution, that no time whatever shall bar the state or county or municipality. Wisely or unwisely, this is the fundamental law and must be observed."
>
> *Warren Co.* v. *Lamkin*, 93 Miss. 123.

The United States Supreme Court upholds the state court in construing state statutes of limitation.

> *Elmendorf* v. *Taylor*, 10 Wheaton 153 (6 L. Ed. 292).

This disposes of the contention of counsel that the city was not holding the stock for public use and his quotation of the case of *Adams* v. *Railroad Company*, 76 Miss. 782 has no bearing on the case. It was only decided in that instance that the city having purchased stock in a railroad company by virtue of legislative authority, had the sole and absolute control thereof and was not subject to state direction and subdivision in regard to a suit about the same and that a suit in regard to the stock would have to be brought in the name of the city instead of the state as was tried by Adams, the revenue agent.

ANSWER TO THE SUPPLEMENTAL BRIEF FILED SEPTEMBER, 1921, BY PLAINTIFFS IN ERROR.

The supplemental brief was handed to counsel for defendant in error, September 23, 1921, after the reply brief for defendant in error had been prepared, but before the finishing of the printing thereof; and therefore we take occasion to answer the supplemental brief in our original reply brief.

Counsel for plaintiffs in error is to be congratulated upon his extraordinary zeal in unearthing the old Act of Congress approved February 16, 1839, which he presents on page 1 of his supplemental brief. This Act, as quoted by him though we have not access to the same at this writing, is as follows:

> "The marshal of the several districts of the State of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the court house in each county on Monday of each week and on the first and second days of each term of the district court; and he may, at the written request of the defendant, change the sale of property to the place where the United States Court for the district is holden; provided, in the opinion of the marshal, the interest of the plaintiff is not compromised thereby."

We shall not take up the time of the court in an argument on this statute, as we do not believe it to be of any force in this case or pertinent in any respect:

First. Because, as counsel admits in his brief, he has just discovered this act and the same was not "especially set up or claimed" by plaintiffs in error in any of the lower courts, as required by Act of September 6, 1916, Chapter 448, (39 Stat. L. 726).

Second. Because this statute was in terms repealed and made of no force by Section 5596, R. S.

Counsel for plaintiffs in error finds that even the statute now quoted of February 16, 1839, and now relied on for the first time, wisely provides that the marshal "may be authorized to sell property at the court house in each county on Monday of each week, etc.," and he may "at the written request of defendant change the sale of the property to the place where the United States Court for the district, etc.": and counsel proceeds by refined process of reasoning to say that a written request to the marshal by the defendant in execution would be presumed.

If we take it that counsel for plaintiffs in error has abandoned his former sole contention that the Act of March 3, 1893 (751 R. S.), was applicable, then this is not a supplemental brief but is a destruction of the first brief and a presentation of a new proposition never before brought up in any court or thought of by any of the judges who had to pass on questions "especially set up or claimed" before them.

That Section 5596, R. S. did repeal the Act of February 16, 1839, as quoted by counsel, is plain.

United States v. *Bowen*, 100 U. S. 513.
Deffeback v. *Hawk*, 115 U. S. 392.

Cambria Iron Co. v. *Ashburn*, 118 U. S. 54.
U. S. v. *Averill*, 130 U. S. 335.
U. S. v. *Lacher*, 134 U. S. 624.
Bate Refrig. Co. v. *Sultzberger*, 157 U. S. 39.
The Conqueror, 166 U. S. 122.
Hamilton v. *Rathbone*, 175 U. S. 421.

The last mentioned decision says:

> "The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create, an ambiguity. * * * The main object of the revision was to incorporate all the existing statutes in a single volume that a person desiring to know the written law upon any subject might learn it by an examination of that volume without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior statutes at large, the main object of the revision is lost, and on one can be certain of the law without an examination of all previous statutes upon the same subject."

As to whether acts not incorporated in the revision are repealed by R. S. 5596, see letter of Chief Justice Waite (IV Lawrence I. Comp. Dec. 101) which is in part as follows:

> "This clause, as is seen, contains not only the repeal but the reason of it. It asserts as such reason the assumed fact that all portions not included in the Revised Statutes, of Acts which have been partially incorporated therein, either have been repealed or superseded by subsequent acts, or are not general and permanent in their nature. It seems clear from this that if a particular section

> of an Act has never been repealed or superseded by subsequent Acts, nor incorporated into the Revised Statutes, and is general and permanent in its nature, it is not within the reason and ground of the repeal, but has been accidentally overlooked or omitted by the revisors."

The Act of February 16, 1839 was without question superseded by Section 916 of the Revised Statutes, which expressly provides how the party recovering a judgment in common law cause may proceed.

The very purpose of the adoption of this statute, to-wit: To have a fixed and universal method of precedure would be overcome if it were held by this court that every Act heretofore passed by the congress with reference to the mode and manner of executing process such as executions would control instead of Section 916.

We find through the statutes at large of the United States hundreds of statutes before the Act of June 1, 1872, being now R. S. 916, and it would create endless labor and useless trouble for counsel all over the United States and officers of the courts to be compelled to thumb through all the statutes applicable in each state ever passed by congress before proceeding with the execution of process.

Our brief with reference to the adoption by the United States Court for the Northern District of Mississippi is applicable here as well as that part of our brief which sets forth beyond contradiction that the marshal was acting under Section 3467 of the Code of Mississippi of 1892.

It was for just such incidents as these where counsel makes general objection and afterwards discovers a mare's nest in the form of an old inapplicable statute and desires to press such point without having first raised it especially in the lower courts, that the Act of September 6, 1916 was passed so that this court need not be compelled to examine cases upon writs of certiorari unless the right, title or immunity is called especially to the lower courts' attention and by them passed upon.

We are pleased that counsel for plaintiffs in error has at last awakened to the fact that the Act of March 3, 1839 (721 R. S.), has no bearing whatever on the trial of this cause; but we insist he is again mistaken in the alleged applicability of the Act of February 16, 1839, and that his setting up of that statute is not in time to avail him.

Conclusion.

We therefore respectfully submit:

First. That the writ of error in this case should be dismissed as without the law.

Second. That the writ of certiorari in this case should be denied because asked for on frivolous grounds and not being grounded on title, right, privilege or immnuity especially set up.

Third. That the decision of the Supreme Court of the State of Mississippi should be upheld by this court as being correct in holding that the sale in controversy was absolutely and utterly void and subject to

collateral attack anywhere, not only according to the decisions of the Supreme Court of Mississippi and the laws of that state, but according to the direct decisions of the Supreme Court of the United States.

Respectfully submitted,

GEO. F. MAYNARD,
W. W. VENABLE,
GERALD FITZGERALD,

I certify that today I sent, postpaid, a copy of the foregoing brief and argument to Messrs. Burch & Minor, counsel for the Yazoo & Mississippi Valley Railroad Company the Mississippi Valley Company, Memphis, Tennessee.

Gerald Fitzgerald

September, 28, 1921

APPENDIX A.

Act of Congress, June 1, 1872, Ch. 255, 17 Stat. L. 197.

Section 914. (*Practice and Proceedings in other than equity and admiralty causes.*) The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding (R. S.).

APPENDIX B.

Section 916. (*Execution in Common-law causes.*) The party recovering a judgment in any common law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes, by the laws of the state in which such court is held, or by any such law as hereafter enacted, which may be adopted by general rule of such Circuit or District Court; and such courts may from time to time by general rules, adopt such state laws as may hereafter be enforced in such state, in relation to remedies upon judgments, as aforesaid, by execution or otherwise (R. S.).

APPENDIX C.

An Act to regulate the manner in which property shall be sold under orders and decrees of any United States Courts.

(Act of March 3, 1893, Ch. 225, 27 Stat. L. 751.)

(Sec. 1.) (Real estate, how sold under order or decree of court.) That all real estate or any interest in land sold under any order or decree of any United States Court, shall be sold at public sale at the court-house of the county, parish, or city in which the property, or the greater part thereof is located, or upon the premises, as the court rendering such order or decree of sale may direct.

(Sec. 2.) (*Personal Property*) That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first Section of this Act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

APPENDIX D.

Sections of the Code of 1871 of the State of Mississippi:

(Chapter 8, Sec. 839.)

"Writs of execution, from the Circuit Court, shall bear date and be issued in the same manner as original process, and shall be made returnable on the first day of the next term of the court in which the pudgment or decree was rendered: *Provided*, there be at least thirty days between the issuance and return thereof; and in

case there shall not be thirty days between the issuance of such execution, and the first day of the next term thereafter; and such execution may be directed to the sheriff or other proper officer of any county in the state, who shall serve and execute the same, and make return thereof to the court in which the judgment or decree was rendered."

(Chapter 8, Sec. 840.)

"If any party at whose suit execution has issued, shall desire to take out another execution, the clerk may issue the same at the cost of such party, if the first writ has not been returned and has not been executed; and when one judgment has been recovered against several defendants, execution shall issue thereon as if it were against one defendant, and not otherwise; and if one or more of several defendants shall have died before the issuance of such writ, and no revivor has been had, the fact of the death shall be noted on the writ, and the property of the survivors only shall, in such cases, be liable to the execution."

(Chapter 8, Section 846.)

"All sales made by any sheriff or other officer, by virtue of any execution or other process, shall be made at the court house of the county, except when personal property, too cumbersome to be removed, shall be levied on, which may be sold at the place where the same may be found, or at any other convenient place, and also, except where cattle, hogs, sheep, or stock, other than horses and mules, are levied on, the same of which may be made within the usual hours, on ten days' no-

tice, at the most public place in the neighborhood of the defendant; and such sales may be made on the first Monday of every month, or on the first Monday or Tuesday of each term of the Circuit Court of the county, and shall not commence sooner than eleven o'clock in the forenoon, nor continue later than four o'clock in the afternoon. Sales of lands shall be advertised in a newspaper published in the county, once in each week, for three successive weeks; and, if there be no such newspaper, or if the publisher thereof shall refuse to publish such advertisement, then such notice shall be given by putting up advertisements, thirty days before the sale, in five public places, one of which shall be the courthouse; and in case of the sale of any personal property, notice shall be given by putting up advertisements ten days before the day of sale, in five public places in the county, one of which shall be at the courthouse door, and the officer shall proceed, at the time and place specified in the notice, to sell, by auction, to the highest bidder, the property levied on, or so much thereof as will satisfy the execution and all costs."

(Chapter 8, Sec. 848.)

"If any property taken in execution shall remain in the hands of the officer unsold, he shall so return on the execution, and thereupon a writ of *venditioni exponas* shall issue, directed to such officer, upon which the like proceedings shall be had as might, and ought to have been had, on the first execution. And if property sold under a *venditioni exponas* shall not bring enough to satisfy the judgment, the officer shall forth-

with return the same to the clerk, who shall thereupon issue another proper execution for the balance remaining unpaid."

(Chapter 8, Sec. 849.)

"Bank notes, bills or evidences of debt, circulating as money, or any share or interest in any incorporated company, belonging to the defendant in execution, may be taken and sold, by virtue of an execution, in the same manner as goods and chattels, or applied to the payment of the execution; and the clerk, cashier, or other officer having the custody of the books of the company, shall, upon exhibiting to him the writ of execution, be bound to give to the officer having such writ, a certificate of the number of shares or amount of the interest held by the defendant in such company, and if he shall neglect or refuse to do so, or if he shall willfully give a false certificate thereof, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect or false certificate, to be recovered in an action on the case against him. The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant."

APPENDIX E.

Sections of the Code of 1892 of the State of Mississippi:

(Chapter 109, Sec. 3460) "*How executions issued and returned.* Writs of execution shall bear date

and be issued in the same manner as original process, and shall be made returnable on the first day of the next term of the court in which the judgment or decree was rendered, if there be fifteen days between the issuance and return thereof; and if not, on the first day of the term next thereafter; and such execution may be directed to the sheriff or other proper officer, who shall serve and execute the same, and make return thereof to the court in which the judgment or decree was rendered."

(Chapter 109, Sections 3463 and 3467.)

3463. *Executions and attachments; how levied.* Every writ of execution or attachment shall be levied in the following manner, namely:

* * * * * * *

3467. (Fourth.) *When on corporate stock.* In case of the levy of an execution or attachment on the stock, shares, or interest of the defendant in any corporation or joint stock company, the officer shall go to the office or principal place of business of the corporation or company, and there declare that he attaches or levies upon the stock, shares or interest of the defendant therein at the suit of the plaintiff; and he shall demand of any officer, agent, or clerk of such corporation or company there present and who is not the defendant, a statement in writing, under oath, of the amount of the defendant's stock, the number of his shares, or extent of his interest in such corporation or company, and shall leave with the officer, agent or clerk, a copy of the writ; but if no such officer, agent,

or clerk be present, he shall post conspicuously at such office or place of business a copy of the writ with a statement therewith that he has attached or levied upon the stock, shares, or interest of the defendant at the suit of the plaintiff, and that he demands of the corporation or company the statement, under oath, of the defendant's stock, share, or interest therein. The stock, shares, and interest of the defendant in the corporation or company, including all dividends that may accrue after such levy, shall be bound by the lien of the execution or attachment. The corporation or company shall within a reasonable time, not longer than 10 days after the levy, deliver to the officer a statement in writing, under oath, of the particulars demanded by the officer, and of the value of the defendant's stock, shares or interest; and in case the corporation or company shall neglect or refuse to do so, or shall willfully make any false statement thereof, such corporation or company shall be liable to the plaintiff for the full amount of the judgment or decree, or of such judgment as the plaintiff shall recover if the process be an attachment; but the failure of the corporation or company to make such statement shall not affect the right of the officer to sell the stock, shares or interest of the defendant."

(Chapter 109, Section 3484.) *"Sales under execution; where made—*

"All sales by any sheriff by virtue of an execution or other process, when not issued by a justice of the peace, shall be made at the court house of the county; but personal property too cumbersome to be removed,

may be sold at the place where the same may be, or at any convenient place; and cattle, sheep, or stock, other than horses and mules, may be sold at any public place in the neighborhood of the defendant's residence."

(Chapter 109, Section 3487.) *"Sales of Personalty: how and when made.*

"Sales of personalty may be made on any day except Sunday, and shall be advertised ten days before the day of sale by posting notices of the time, terms and place of sale in three public places in the county, one of which shall be at the court-house."

(Chapter 109, Section 3492):

"Venditioni exponas. If any property taken in execution shall remain in the hands of the officer unsold, he shall so return on the execution, and thereupon a writ of *venditioni exponas* shall issue, directed to the officer, upon which the like proceedings shall be had as might and ought to have been had on the first execution. And if property sold on a *venditioni exponas* shall not bring enough to satisfy the judgment, the officer shall forthwith return the same, and thereupon another proper execution for the balance remaining unpaid may be issued."

(Chapter 109, Section 3493):

"Venditioni exponas when officer taking property dies. When the officer taking property under execution shall die before the sale thereof, a writ of *venditioni exponas* shall issue, directed to the proper officer of the county in which the property was taken, and such officer,

shall, under the writ of *venditioni exponas*, receive the property from the representatives of the former sheriff, or other officer, who are required to deliver the same to the officer having the *venditioni exponas*, on his producing the same and executing a receipt for the property and the officer shall proceed to sell the same as in other cases."

APPENDIX F.

Act of Congress, September 24, 1789, Chap. 20, 1 Stat. L. 92. Section 721 (Laws of the states, rules of decision). The laws of the several states, exexcept where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply (R. S.).

(The above Act is a complementary provision to Section 914.)

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—IN THE—

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in Error, Petitioners,

vs. No. 122 15

CITY OF CLARKSDALE,
Defendant in Error, Respondent.

H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Plaintiffs in Error, Petitioners.
BLEWETT LEE,
Of Counsel.

—IN THE—

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in Error, Petitioners,

vs. No. 122

CITY OF CLARKSDALE,
Defendant in Error, Respondent.

SUPPLEMENTAL BRIEF FOR PLAINTIFF.

This supplemental brief is filed merely to invite the attention of the Court to an old act of Congress, approved February 16, 1839, which provides that:

> "The Marshal of the several districts of the State of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the court house in each county on Monday of each week and on the first and second days of each term of the district court; and he may, at the written request of the defendant, chang the sale of property to the place where the United States Court for

the district is holden; provided, in the opinion of the marshal, the interest of the plaintiff is not compromitted thereby."

5 Stat. L. 317

This suit is a bill in equity by the City of Clarksdale, attacking an execution sale by the marshal made in December, 1897, pursuant to an admittedly valid judgment. The principal, if not the sole, ground of the attack is that the marshal sold at the front door of the Federal Court House and not at the front door of the court house of the county. The bill was filed in March, 1917.

In view of the fact that the bill attacking this execution sale was not filed until twenty years after the sale, every presumption in favor of the validity of the sale will be indulged, including a presumption, if necessary, that this sale was made at the front door of the Federal court house pursuant to a written request by the defendant in the execution.

23 Corpus Juris, p. 660, sec. 641.
3 Freeman on Ex'ns. (3rd ed.) sec. 339.

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish."

White v. Luning, 93 U. S. 514.

"Where there is any defect in stating the facts necessary to support a sale, the existence of such facts will generally be presumed. A bona fide pur-

chaser at a sheriff's sale is protected by the presumption that the judgment of a competent court of record has been correctly rendered and that the execution in the hands of the officer has been regularly issued. He may fairly presume that the sheriff, in the discharge of his duties, has acted according to law."

3 Freeman on Ex'ns. (3rd ed.) sec. 339.

Therefore, if the officer's return fails to state that the land was appraised before sold, the presumption, in the absence of any other evidence on the subject, must be indulged that the sheriff did his duty in regard to such appraisement.

Talbott v. Hale, 72 Ind. 1.

"In the absence of proof to the contrary, the courts will, as a general rule, indulge all presumptions in favor of the regularity of the judgment, execution, and levy upon which an execution sale was founded, and of all proceedings, in connection with the sale . . . To overcome this presumption of regularity, the evidence must be clear and satisfactory."

23 Corpus Juris, p. 660, sec. 641.

An illustrative case is Schroder v. Pehling, 20 S Dak. 642. The judgment was rendered August 3, 1893. Execution issued December 4, 1899. The statute provided that no execution could issue after five years from the judgment without leave of court. The Code provided a manner for obtaining such leave and specified that it should not be necessary when

timely execution had been issued and returned unsatisfied. There was no proof of such prior execution nor of any leave of court. The court sustained the sale, however, saying:

"It further appears that the execution was issued after the lapse of five years from the entry of the judgment, but, in the absence of anything whatever to the contrary, it will be presumed in support of the action of the trial court that leave was obtained or rendered unnecessary, pursuant to section 329 of the Revised Code of Civil Procedure."

Schroder v. Pehling, 20 S. Dak. 645.

The decided cases furnish many other instances in which this presumption has been declared and applied. For example:

The sheriff's return on an execution, under which several lots were sold, recited: "I exposed the said property for sale and sold the same to L., she being the highest bidder." The statute required that the sheriff first offer the property in parcels and then as a whole and accept the bid for the whole only if it exceeded the aggregate of the bids for the parcels. It was held that the return quoted did not overcome the presumption that the sheriff had complied with the statute.

Lepel v. Kus., 38 Colo., 292.
Ferrier v. Deutchman, 81 Ind. 390.
Lelend v. Cameron, 31 N. Y. 122.

Where the statute requires an exhaustion of personalty before levying an execution on land, it will

be presumed in favor of an execution sale of land that the defendant had no personal property subject to execution and that the officer had done his full duty in the premises.

Holcomb v. Hays (Ky.) 62 S. W. Rep. 1028.
Murray v. Hoboken Land Co. 17 How. (U. S.) 272.

Where a whole tract of land, including a homestead therein, is sold under execution, the court will presume, in the absence of evidence, that the excess was first sold, and that the homestead was sold only after the rest of the land had failed to produce enough to satisfy the execution.

Corey v. Fowle, 161 N. Car. 187.

Where it appears that the sheriff sold land under an execution and that the tenant and those under whom he claimed had been in actual possession of the land for thirty years undisturbed by the judgment debtor or any person claiming through or under him, the court will presume a regular exercise of his authority by the sheriff and this presumption will be accepted instead of proof against all parties claiming adverse to the execution sale.

Robinett v. Preston, 4 Gratt (Va.) 141.

—o—

It will probably be argued that the Act of February 16, 1839, was repealed by the General Repealing Section of the Revised Statutes, sec. 5596. That section, however, reads as follows (italics ours):

"All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is em-

braced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature; *Provided*, that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, *shall not repeal, or in any way affect* any appropriation, *or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force;* and all acts of Congress passed prior to said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

Rev. Stat., sec. 5596.

U. S. Comp. Stat. Ann., sec. 10593.

Since the Act of February 16, 1839, was a purely local act, it is saved by the proviso.

It can not be claimed that the Act of February 16, 1839, was impliedly repealed by the adoption of the Revised Statutes. The rule in this respect is well settled that the repeal of a statute by implication is not favored. Particularly is it true that the repeal of a local or private act will not be implied from the subsequent passage of a general act unless the two acts are absolutely repugnant.

This general rule, as applicable to the case at bar, was thus set forth by Mr. Justice Story and later

quoted with approval by Mr. Justice Harlan, speaking for the Court, referring to the question of a repeal of a statute by implication:

"'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the pro visions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy.' In State v. Stoll, 17 Wall. 330, the language of the Court was that 'it must appear that the latter provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed, in part or wholly, as the case may be.''

Chew Heong v. U. S., 112 U. S. 550.
Wood v. U. S., 16 Pet. 362.

The same rules of construction have been indicated and applied in other cases.

Arthur v. Homer, 96 U. S. 140.
Ex parte Crow Dog, 109 U. S. 570.

In the last named cause, Mr. Justice Matthews, speaking for the Court, said:

"The rule is *Generalia specialibus non derogant.* 'The general principle to be applied,' said Bovill, C. J., in Thorpe v. Adams, L. R., 6 C. P. 135, 'to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champneys, 30 L. J. Ch. 782, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention to do so.'"

Ex parte Crow Dog, 109 U. S. 570.

We submit therefore, that, since the bill in this case was not filed until twenty years after the execution sale and is a collateral attack on that sale, the presumption will be indulged that the officer did his full duty and that, in selling at the front door of the Federal Court House, he acted pursuant to a written request from the defendant in the execution. There is no requirement that the marshal shall set forth such a request in his return or that it shall be filed.

Respectfully submitted,

H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Plaintiffs in Error, Petitioners.

BLEWETT LEE,
Of Counsel.

Receipt of the foregoing supplemental brief is hereby acknowledged. This, the.....day of September, A. D., 1921.

.....
Counsel for City of Clarksdale.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

NO. [redacted]15

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY;

MISSISSIPPI VALLEY COMPANY;

D. A. SCOTT, and

E. M. YERGER, Plaintiffs in Error.

vs.

THE CITY OF CLARKSDALE, Respondent.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF THEREON

GEO. F. MAYNARD
GERALD FITZGERALD.
Solicitors for Respondent.

THE CHALLENGE, CLARKSDALE, MISS.

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IN THE SUPREME COURT OF THE UNITED STATES.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners.

vs.

THE CITY OF CLARKSDALE, Respondent.

IN RE: WRIT OF ERROR.

Now comes the respondent, the City of Clarksdale, by its solicitors, Maynard & Fitzgerald, and moves the Court to dismiss the Writ of Error herein because:

First, the judgment in this cause was rendered on the 21st day of April, 1919, after the taking effect of the Act of September 6, 1916 (Chap. 448, sec. 2, 39 Statutes L. 726) amendatory of section 237, Judicial Code (Act March 3, 1911, C. 231, 36 Statutes 1156) (comp. st., sec. 1214); and there is not drawn in question the validity of a treaty or statute of or an authority exercised under the United States; nor is there drawn in question the validity of a statute of or of an authority exercised under any state on the ground of their being re-

pugnant to the constitution,treaties,or laws of the United States. And therefore the decision in this cause by the Supreme Court of the State of Mississippi can only be reviewed, if at all, by this Court upon a Writ of Certiorari.

Second, there is no Federal question involved in this cause.

Third, this cause was decided by the Supreme Court of the State of Mississippi upon the construction of State Statutes, and upon which the decision of the Supreme Court of the State of Mississipi is final, binding and conclusive.

Fourth, this cause was decided upon sufficient grounds other than those involving Federal questions, if any, to base the decision of the Supreme Court of the State of Mississippi upon, regardless of Federal questions, if any.

Fifth, there is no Federal question decided in this cause; and, if decided, then within the law.

Sixth, the petition for and Writ of Error state that in this cause there was "drawn in question the validity of an authority exercised under the United States, to-wit: an execution sale by the United States Marshal under an execution issued in August.1897, by the United States Circuit Court for the Northern District of Mississippi pursuant to a judgment duly rendered by said Court; and the validity of the authority exercised under the United States, further, to-wit: the act of the Marshal, pursuant to said execution sale, in endorsing and delivering to the purchaser at said sale (the vendor of plaintiffs in er-

ror, the Mississippi Valley Company) a certificate of stock representing two hundred and fifty (250) shares of the capital stock of the Louisville, New Orleans and Texas Ry. Co. and the decision of said Supreme Court of Mississippi was against the validity of said authority; and the decision in said cause should have been in favor of the validity of said authority and the said Supreme Court of Mississippi erred in not dismissing the Bill of the defendant in error as more fully apppers from the assignments of error filed herein"(Rec.p.124) and it appears from the assigments of error therein mentioned and from the Writ aforesaid that the validity of an authority exercised under the United States, as aforesaid, was never questioned or decided; but that the question which arose was as to the construction of the State Statutes with regard to a sale under execution. And therfore this cause could only be re-examined under the said Act of September 6, 1916, 39 st. L. 726, under that paragraph with reference to the issuance of certiorari which ,is as follows "or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of,or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity, especialy set up or claimed by either party under such constitution, treaty, statute commission or authority."

Seventh, and for other reasons apparent.

Respectfully submitted,

GEO. F. MAYNARD

GERALD FITZGERALD

Solicitors for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ,ET AL., Petitioners,

No. 402.

THE CITY OF CLARKSDALE, Respondent.

TO THE HONS. C. N. BURCH AND H. D. MINOR
Solicitors for Plaintiffs in Error.

THE PETITIONERS;

The Yazoo & Mississippi Valley Railroad Company, the Mississippi Valley Company, D. A. Scott and E. M. Yerger, plaintiffs in error:

You will please take notice that in answer to your petition for, and writ of error made in the Supreme Court of the United States May 24, 1919, and filed in the said Supreme Court of the United States June 5, 1919, respondent will, on October 6, 1919, at noon or as near thereafter as may be allowed by the Court, make motion to dismiss said writ of error for the reasons above shown.

GEO. F. MAYNARD

GERALD FITZGERALD
Solicitors for Respondent.

STATEMENT OF THE CASE AND BRIEF.

STATEMENT.

There is involved in this cause the title to two hundred and fifty (250) shares of stock of the Yazoo & Mississippi Valley Railroad Company,issued to the City of Clarksdale on April 29, 1891. The original bill was filed against the Yazoo & Mississippi Valley Railroad Company asking for the reissuance of this stock and alleging that the same had been lost, destroyed, or stolen. The defendants, the Yazoo & Mississippi Valley Railroad Company, answered admitting the ownership of the stock in the City of Clarksdale up to the date of December 6, 1897,upon which date it was alleged by the defendant railroad company that the said stock was sold by the Marshal of the United States Court for the Northern District of the State of Misissippi at Oxford, Mississippi, in pursuance of an execution on a valid judgment against the said City of Clarksdale; and that the Mississippi Valley Company,a holding corporation owner of the Yazoo & Mississippi Valley Railroad Company,had since purchased said stock and was at the date of suit the owner thereof.

The cause thereupon went to trial and upon the introduction of the returns of the execution, the City of Clarksdale, admitting the validity of the judgment, attacked the sale collaterally for the following reasons:

To the execution marked exhibit "HDM No. 2", record page 54, the following objections were made:

"First, that the return on said execution does not show proper levy; Second, that the return on its face shows that the property levied on was sold at the wrong time and wrong place and in an improper manner; Third, that the return attempts to show the execution of a writ of venditioni exponas on which paper alone the return could be made, and because the return is truly and absolutely void as to the actual sale and delivery of any of the share, interest or stock of the City of Clarksdale in and to the L., N. O. & T. Ry. Co. or the Y. & M. V. Railroad Co.; because the return is not in conformity with the statutes of the state of Missisippi in regard to the levy and sale of such property in any respect; because the return does not show any authority by law to make such a levy as is alleged to have been made or to make such a sale as is attempted to be shown by the return." (Record p. 57)

To the execution marked "HDM No. 6," page 58 of the record, the City of Clarksdale made the following objections, (rec. p. 60):

"Because the paper is incompetent, immaterial and irrevelant; because the return does not show any sale; because the return is made or proposed to be made by Deputy United States Marshal of the Southern District of Missisippi, and no sale is alleged to have been made by him;because no levy is shown by the execution as required by the Statutes of Mississippi or the law in force at the time as acknowledged and acted upon by the United States Court in the districts of Mississippi; because the return is void except as a return "nulla bona" and shows on its face that no action was taken by the officer."

Upon these objections, the Chancery Court of Coahoma County, Mississippi, before whom the case was then being tried, ruled the evidence out and gave judgment in favor of the complainant for the possession of the stock. The case was thereupon appealed to the Supreme Court of the State of Mississippi and affirmed without opinion. Whereupon, the plaintiffs in error prayed for a Writ of Error from the Supreme Court of the United States to the Supreme Court of Mississippi on the 23rd day of May, 1919 (rec. p. 121) and the same was granted on the 24th day of May, 1919 (rec. p. 124).

BRIEF.

It is plain to the Court that the sole question involved in the trial of this cause was the right of ownership of the said stock in said railroad company and that the plaintiffs in error depended solely and entirely upon a sale thereof made by the United States Marshal as evidenced by the two executions (rec. p. 54; rec. p. 58).

It is elementary that the Federal system of administering common law does not provide the form, maner or means of executing its own judgments. The Act of June 1, 1872, chapter 255, 17 st. L. 197 which is section 914 of Judicial Code is as follows:

> "Sec. 914. **Practice and Proceeding in other than equity and admiralty causes.** The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may

be, to the practice, pleadings and forms and modes of proceeding **existing at the time** in like causes in the Courts of record of the State within which such Circuit or District Courts are held, any rule of the Court to the contrary notwithstanding."

So, therefore, the only way to enforce one's judgment in the Federal Court is to proceed according to the state practice. There was further passed on June 1, 1872, Chapter 255, 17 st. L. 197, another statute of the United States with reference to executions in common law causes (sec. 916 of the said Judicial Code) and being as follows:

"Sec. 916 **(Executions in common-law causes.)** The party recovering a judgment in any common-law cause in any district or circuit court, shall be entitled to similar remedies upon the same, by execution or otherwise to reach the property of the judgment debtor,as are now provided in like causes by the laws of the State in which such court is held,or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may,from time to time,by general rules,adopt such State laws as may hereafter be in force in such states in relation to remedies upon judgments,as aforesaid, by execution or otherwise. (R. S.)

It was further incumbent upon the Marshal in making sale of the stock in the railroad company in the present suit, and the only way in which he could make sale, to proceed under the State Statutes and state procedure to make his levy and

sale. The state statute then in force in regard to the sale, is section 3484, Code of 1892, in regard to the manner of sales under execution, is as follows:

> "Sales under execution, Where made—All sales by any sheriff, by virtue of an execution or other process, when not issued by a Justice or other prcess, when not issued by a Justice of the Peace,shall be made at the Court House of the county; but personal property too cumbersome to be removed, may be sold at the place where the same may be, or at any convenient place; and, cattle, sheep, or stock, other than horses and mules, may be sold at any public place in the neighborhood of the defendant's residence."

But counsel for plaintiffs in error contends that as section 916 of the Judicial Code above quoted, having been adpted in 1872 and the Code of Mississippi of 1871 being in force at that time,that the 1871 statute applies, which is as folows:

> "Sec. 846. All sales by any sheriff or other officer, by virtue of any execution or other process, shall be made at the Court House of the county, except when personal property too cumbersome to be removed, shall be levied on which may be sold at the place where the same may be found, or at any other convenient place, etc. * * * and such sales may be made on the first Monday of every month, or on the first Monday or Tuesday of each term of the Circuit Court of the County, etc."

However, as both the statute of 1871 and of

1892 required that property levied on by execution should be sold at the front door of the Court House in the county in which the levy was made, and as both Codes provide for practically the same procedure there would be no question still of the sales being void. But counsel for plaintiffs in error contended in the Lower Courts and in the Supreme Court of Mississippi and now contends that none of the State Statutes apply, but that the Act of March 3, 1893, Chapter 225, 27 st. L. 751 which is as follows:

> **"An Act to Regulate the Manner in which Property shall be sold under order or decree of any United States Court.**
>
> Section 1. (Real Estate, how sold under order or decree of Court) That all real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Court House of the County, Parish or City in which the property, or the greater part thereof, is located, or upon the premises as the Court rendering such order or decree of sale may direct.
>
> Sec. 2. (Personal property) That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this Act, unless in the opinion of the Court rendering such order or decree, it would be best to sell it in some other manner."

And, relying upon this statute, counsel claims that a Federal question is injected into this cause for the reasons assigned in his petition for Writ of

Error, page 121 of the record, according to paragraphs 2, 3, 4, 11, 12, 13, 15 and 16 of said petition or assignment of errors. By which assignments it appears that as more specifically stated in assignment No. 3 at top of page 122 of the record which is as follows: (The Mississippi Supreme Court erred)

> "3. In refusing to hold and adjudge that the law governing the place of sale under said execution was the act of Congress, March 3, 1893, 27 st. L. 751, and in holding and adjudging that the applicable law was the law of Mississippi."

In passing, we desire to call the Court's attention to the fact that the said Act of March 3, 1893, Chapter 225, 27 st. L. 751, is an act to regulat the manner in which property shall be sold under **order or decree** of any United States Court and not to regulate the manner in which sale should be made under execution at common law. The United States Court made no order or decree in the cause in which the stock was sold as shown by the Clerk's certificate (record p. 93) so that if the above statute applied, which of course it does not, the sale would still have had to have been made at the County Court House. As will be seen upon examination, this statute is no part of the common law procedure, nor is it incorporated in the Judicial Code as compiled March 3, 1911. As said by the Court in re: LaFrance Copper Co. (205 Fed. Rep. 207):

> "The act of March 3, 1893, (R. S. 751) seems to relate to judicial sales pursuant to some order or decree creating or declaring

> the right to sell and which right could not be exercised but for the order or decree; sales necessarily authorized and ordered by the Court; sales void but for such order or decree; sales divesting the title of the former owner."

And in the the case of Landsburg vs. McCormick, 224 Fed. Rep. 874, the Court said:

> "Indeed the Court recognizes and distinguishes the case of Godchaux vs. Morris. The cases holding sales made by merely ministerial officers at a place not authorized by statute to be void, obviously stand on a different footing."

We submit on the whole that it is perfectly plain that the Act of March 3,1893, sec.751 R. S. stands as reference only to sales made under **order or decree** of the Court and not to sales made under execution at common law.

Therefore the whole case resolves itself into the simple question as to whether or not the sale of the stock in said railroad company made by the Marshal on December 6, 1897, at Oxford, Mississippi, was properly made under the state laws, or whether it was so improperly made as to be void; and of the further question, did the trial of the title to this stock as claimed under said execution sale involve the "question of the validity of a treaty or statute of, or an authority exercised under the United States and the decision is against their validity; or the validity of a statute of or an authority exercised under any state,on the ground of their being repugnant to the constitution,treat-

'es or laws of the United States",as set forth in the Act of September 6th, 1916 (Ch. 448, 39 St. L. 726) with reference to writs of error, or was there involved a "title, right, privilege or immunity claimed under the authority exercised under the United States", as provided in the last portion of that section of said Act with reference to writs of certiorari.

Answering these questions, it is only necessary to refer the Court, first, to the decision of the Lower Court and the Supreme Court of the State of Mississippi in the present cause, and the following cases, which hold that a sale made by the Sheriff of the County or the Marshal of the United States under execution at common law of real or personal property when not made at the County Court House is void and subject to collateral attack.

Cole vs. Bridges, 45 Miss. 257.
Jones vs. Rogers, 85 Miss. 802.
Moody vs. Moeller, 13 Am. St. Rep. 839
Sinclair vs. Stanley, 64 Tex. 67.

"Under the laws of the United States relating to the sales of property taken under execution in common law cases pending in the Circuit Court (of the U. S.) defendant in execution is entitled to have the sale of land seized under execution made at the door of the Court House of the County in which it is situated."

Borneman vs. Norris, 47 Fed. Rep. 438
Smith vs. Cockerill, 6 Wall. 756.

Angel vs. Byers, 153 Ky. 214 (154 S. W. 1111)

Page vs. Turk, 43 Okla. 675 (143 Pac. 1049)

Tolbert vs. State Bank, 30 Okla. 407 (121 Pac. 212)

Hancock vs. Youree, 25 Okla. 463 (106 Pac. 842)

Merchants Bank vs. Evans, 51 Mo. 343.

Capital Bank vs. Huntoon, 35 Kan. 592 (11 Pac. 377)

The Supreme Court of the Unted States will follow and be bound by the construction given by the highest Court of the state to the statutes of that state.

> 'Where the construction given by the highest Court of the state to the constitution or a statute of the state has been uniform and is settled, it is binding on the Courts of the United States as a rule of decision."
>
> Webster vs. Cooper, (14 Howard 488)
>
> "As a rule,the Supreme Court of the United States treats the construction which the highest Court of the state has given to a statute of that state as a part of the statute."
>
> Douglass vs. Pike County, (101 U. S. 678)
>
> "The construction of the State Statute by the State Court is to be accepted by the Federal Court in determining whether the state statute violates the Federal constitution."

Cargill Company vs. Minesota etc. (180 U. S. 452)

"So the decisions construing the practice acts of the state are binding upon the Courts of the United States."

At. & Pac. R. R. Co vs. Hopkins. (94 U. S. 12)

McGoon vs. Scales. (9 Wall 23)

WRIT OF CERTIORARI — PROPER REMEDY, IF ANY.

Under the act of September 6, 1916, chapter 448,39 St. L. 726, amending section 237 of the Judicial Code, it is provided that a "final judgment or decree in any suit in the highest Court of the state in which a decision of the suit could be had, where is drawn in question the validity of a treaty or a statute of, or authority exercised under the United States and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of the validity." That the same may be re-examined and reviewed or affirmed in this Court upon a Writ of Error; but that "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed by either party under such constitution,

treaty, statute, commission or authority," then the Supreme Court might at its discretion review the same by Writ of Certiorari.

In the case of Philadelphia and Reading Coal and Iron Company vs. Gilbert (245 U. S. 162) Mr. Justice Vandevanter construes the statute in these words:

> "The difference between the two modes of securing the review as contemplated by the statute lies in the fact that a Writ of Error is granted as of right, while a Writ of Certiorari is granted or refused in the exercise of sound discretion."

And further:

> "Under section 237 of the Judicial Code as amended September 6,1916 Chapter 448, 39 St. L. 726) (Comp. stat. 1916—1214), a final judgment or decree of a state court of last resort in a suit "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution,treaties,or laws of the United States, and the decision is in favor of their validity" may be reviewed in this Court on Writ of Error, but if the suit be one "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the va-

lidity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is against their validity; or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed by either party, under such constitution, treaty, statute, commission or authority," the judgment or decree can be reviewed in this Court **only** upon a Writ of Certiorari."

"A Writ of Error must be dismissed, even though the defendant in error does not object to the jurisdiction where the judgment of the State Court was entered after the Act of September 6 1916 (39 St. L. 726) took effect and did not draw in question the validity of anything described in this section as authorizing review on Writ of Error."

No. Pac. R.R. Company vs. Solum, 247 U. S. 477.

It is perfectly patent in the case at bar that the validity of a treaty or statute or an authority exercised under the United States was not drawn in question nor was there drawn in question the validity of a statute or an authority exercised under any state on the ground of their being repugnant to the constitution,treaty or laws of the United States And it is equally patent that if any Federal question at all was injected into the case that it was

simply a question of a title, or right claimed under the Statutes or of authority exercised under the United States.

It is stated by Mr. Chief Justice White in the case of Maude L. Andrews vs. Va. R. R. Company adv. ops. 1918-19, p. 154, that the power to review by Writ of Error to the State Supreme Court cases therein tried was limited and circumscribed by the Act of September 6, 1916 (39 St. L. 726, Chapter 448, comp. Stat. 1916, sec. 1207) to those cases which come within the generic class of cases stated in said Act and that only by Writ of Certiorari could cases of another nature be reviewed.

We submit that this cause is not such an one as can be reviewed by the Supreme Court on Writ of Error and that, therefore, the Writ of Error heretofore granted should be dismissed.

Respectfully submitted,

GERALD FITZGERALD

GEO. F. MAYNARD

STATE OF MISSISSIPPI.
COAHOMA COUNTY.

This day personally appeared before me, the undersigned, a duly qualified and acting Notary Public within and for the county and state aforesaid, Gerald Fitzgerald, who having been by me first duly sworn states on oath that he is a member of the Bar of the Supreme Court of the United States and that he has on the 20th day of September, 1919, mailed by registered mail to Hons. H.

D. Minor and Chas. N. Burch, solicitors for the plaintiffs in error, at their post office in Memphis, Tennessee, a full, true and correct copy of the foregoing motion to dismiss the Writ of Error herein and the brief thereon.

GERALD FITZGERALD

Sworn to and subscribed before me this the 20th day of September, 1919.

E. J. MULLEN,
Notary Public.

My commission expires Oct. 18, 1921.

OCT 29 1919
JAMES D. MAHER
CLE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs.

No. 402.

CITY OF CLARKSDALE,
Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO AMENDED MOTION TO DISMISS WRIT OF ERROR.

H. D. MINOR,
CHAS. N. BURCH,
For Plaintiffs in Error.

BLEWETT LEE,
Of Counsel.

LATHAM & ARNOLD - MEMPHIS

IN THE

SUPREME COURT OF THE UNITED STATES.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs. No. 402

CITY OF CLARKSDALE,
Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO AMENDED MOTION TO DISMISS WRIT OF ERROR.

In a paper filed by the defendant in error and styled "Brief in Reply Upon Motion to Dismiss," (copy handed to us October 18, 1919), the point is made for the first time that the writ of error was not properly allowed because allowed by the Chief Justice, Sydney Smith. The claim is made that the cause was heard by Division B of the Mississippi Supreme Court of which Division Justice Cook is the Presiding Justice, and that, therefore, Justice Cook alone could allow the writ of error.

There was no allusion to this ground in the original motion to dismiss the writ of error. Hence the necessity for this memorandum for the plaintiffs in error.

WRIT OF ERROR PROPERLY ALLOWED BY THE CHIEF JUSTICE.

The Act of Congress is quite plain that the writ must be allowed by "the Chief Justice . . . . of such court rendering the judgment or passing the decree complained of." Rev. Stat. Sec. 999. Necessarily the inquiry is, therefore, what court rendered the judgment and who was the Chief Justice of that Court?

It is only necessary to refer to the Constitution of Mississippi (1890), the applicable sections of which are, for the convenience of the Court, printed in the appendix hereto.

Section 144 provides that "the judicial power of the State shall be vested in a Supreme Court, and such other courts as are provided for in this Constitution." All the other courts provided for by the Constitution are nisi prius courts.

This section (144) remains unchanged. In 1916, Sec. 145 was amended so as to make the judges elective by the people and two entirely new amendments were adopted so as to have the Court composed of six instead of three members, and to confer on "the Supreme Court" power, "under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom, when convened, shall form a quorum." See Appendix.

By a law long in force, "the judge of the Supreme Court, who has been for the longest time continuously a member of the Court, shall be chief justice." Code 1906, sec. 4917.

There is, therefore, but one Supreme Court of Mississippi and but one chief justice. All judg-

ments, whether the case was heard by the Court sitting en banc or by one of the two divisions, are the judgments of the Supreme Court and not of any division thereof. The record in the present case shows a judgment of affirmance by *the Supreme Court*. There cannot be a judgment of a Division of the Court as contrasted with a judgment of the Court itself.

> "It frequently happens that a court is divided into a number of different departments, parts, or divisions, and the legislature has power so to regulate the business of a court in the absence of any constitutional prohibition. But the court remains a unit notwithstanding such a division; and where the constitution vests the power in the court and not in departments, which are merely for convenience, the judges hold but one and the same court whether sitting separately or together."
>
> 15 Corpus Juris, p. 869.

There is no court in Mississippi, either under the Constitution or the laws of that State, known as Division B or Division A. There is but one appellate court, and, as indicated, all judgments rendered on appeal are rendered by "the Supreme Court" and are the judgments of that Court and not of any division thereof.

Respectfully submitted,

H. D. MINOR,
CHAS. N. BURCH,
For Plaintiffs in Error.

BLEWETT LEE,
Of Counsel.

I certify that today I mailed, post paid, a copy of this memorandum to Messrs. Geo. F. Maynard and Gerald FitzGerald, counsel for defendant in error, at Clarksdale, Miss.

H. D. MINOR

Memphis, Tennessee, October 23, 1919.

APPENDIX.

Constitution of Mississippi (1890) *and Amendments.*

Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

Section 145. The Supreme Court shall consist of three judges, any two of whom when convened shall form a quorum. The legislature shall divide the state into three Supreme Court districts, and there shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law; but the removal of a judge to the state capital during his term of office shall not render him ineligible as his own successor for the district from which he has removed. The present incumbents shall be considered as holding their terms of office from the state at large. The adoption of this amendment shall not abridge the terms of any of the present incumbents, but they shall continue to hold their respective offices until the expiration of the terms for which they were respectively appointed.

(This is the original sec. 145 as amended in 1916. It changes the original section by substituting a selection by the people for an appointment by the Governor).

Section 286. The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by section 145 of this constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by section 145 of this constitution, or any

amendment thereto. Their term of office shall be as provided by section 149 of this constitution or any amendment thereto.

Section 287. The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof.

(The two latter sections are amendments adopted in 1916.

Office Supreme Court, U. S.
FILED
OCT 18 1919
JAMES D. MAHER,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO., ET AL,
Plaintiffs in Error,

vs. **No. [redacted]**

CITY OF CLARKSDALE,
Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO MOTION TO DISMISS WRIT OF ERROR.

H. D. MINOR,
CHAS. N. BURCH,
For Plaintiffs in Error.

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THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL,

Plaintiffs in Error,

vs. No. 402

THE CITY OF CLARKSDALE,

Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO MOTION TO DISMISS WRIT OF ERROR.

THE CASE STATED

The Pacific Improvement Company, in 1897, recovered a judgment for over $3,000 against the City of Clarksdale in the United States Circuit Court at Oxford, Mississippi. Execution issued and was levied by the marshal on a certificate representing 250 shares of the capital stock of the L. N. O. & T. Railroad Co., which certificate had been issued to the City of Clarksdale.

After advertisement, the marshal offered the certificate for sale at auction, December 6, 1897, whereupon, it was bid in by the Pacific Improvement Company. Seven years later, the Improvement Company sold the certificate to the Mississippi Valley Company, (a plaintiff in error), the present owner of the certificate. Nearly twenty years after

the execution sale, and without having complained meanwhile, the City of Clarksdale filed the present bill in the Chancery Court of Coahoma County, Mississippi, against The Yazoo & Mississippi Valley Railroad Company, a plaintiff in error, averring that the City was the owner of 250 shares of stock in the L. N. O. & T. R. R. Co., which had, meanwhile, been consolidated with The Yazoo & Mississippi Valley Railroad Company, under the latter name; that the certificate had been lost or mislaid and could not be found, and prayed the Railroad Company be compelled to issue a new certificate.

The Y. & M. V. R. R. Co. filed an answer to the effect that the certificate representing said 250 shares had been sold by the marshal as above indicated, and that the Mississippi Valley Company was the owner of it by purchase from the purchaser at the marshal's sale. Laches, estoppel and statutes of limitation were also pleaded. The last paragraph of the answer was made a cross-bill, the prayer being that, on the facts stated, a decree be entered adjudging complainant's claim to this stock to be without merit and enjoining complainant from asserting further claim thereto. All relief under this cross-bill was waived at the hearing and before decree (p. 107).

Thereupon, the complainant (defendant in error) filed an answer to the cross-bill, denying in formal terms all that was said in the answer of the Railroad Company respecting the sale of this property under execution and an amended bill was filed by the complainant to bring in the Mississippi Valley Company. The latter company filed an answer practically identical with that of the Railroad Company.

The questions in the case became, therefore (1) the validity vel non of the execution sale by the

marshal; (2) whether the invalidity, if any, in that sale was available on collateral attack; and (3) whether the City was barred from the equitable relief it sought by laches, estoppel or limitation.

The Chancellor rendered a final decree not only declaring the ownership of this stock to be in the City but decreeing specifically (p. 109) "that all rights, title and claims, both legal and equitable set up herein" by the Mississippi Valley Company or The Yazoo & Mississippi Valley R. R. Co. in or to the stock in question "be and the same is hereby cancelled and declared as null, void and of no effect." (pp. 109-110).

The decree was affirmed, without opinion, by the Supreme Court of Mississippi (pp. 116-117), whereupon this writ of error was sued out, and the City now moves to dismiss the writ.

I.

The first ground of the motion to dismiss is practically identical with the sixth and will be discussed under the latter ground.

II.

FEDERAL QUESTIONS PRESENTED.

The second ground of the motion is that there is no Federal question here. This contention is unsound for several reasons:

1. In the case of Avery vs. Popper, 179 U. S. 314, the Court said:

> "With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in

the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from the authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal Court, *or the regularity of the proceedings under the execution* are assailed."

Avery vs. Popper, 179 U. S. 314.

The same principle finds support in numerous other cases.

Pittsburg, Etc., Rd. Co. vs. Trust Co., 172 U. S. 493;

Tullock vs. Mulvane, 184 U. S. 534.

2. There is also involved here the applicability and effect of the Act of Congress of March 3, 1893, (27 Stat. L. 751), which provides:

"Sec. 1640. All real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the court house of the county, parish, or city in which the property, or the greater part thereof, is located, or on the premises, as the court rendering such order or decree of sale may direct.

"Sec. 1641. All personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this Act, (Sec. 1640 supra), unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner."

3 U. S. Comp. Stat. (Ann.) 1916, Sec. 1640-41, p. 3259; 27 Stat. L. 751.

(Judge Sanborn, speaking for the Court, has referred to this Act as embracing execution sales. Re: Brittannia Min. Co., 203 Fed. Rep. (C. C. A.) 452).

It is no answer to our proposition that the Act of Congress of March 3, 1893, (27 Stat. L. 751) provides for a sale at the "court house of the county," as is required by the Mississippi Code. For, as will be more fully argued when the merits of the case are reached, the effect of a failure to sell at the court house of the county, (in this case the sale was at the Federal court house, where the judgment was rendered), becomes a question as to which this court will take its own view and will not be bound by the decision of the State Court. It seems clear from the decisions of this court that an execution sale is not void but merely irregular where the sale occurs at a wrong place. Therefore, the sale would not be subject to collateral attack.

Wheaton vs. Sexton, 4 Wheat., 503;

Voorheis vs. Jackson, 10 Pet. 474;

Griffith vs. Bogert, 18 How. 158.

3. That a Federal question is here must follow the general principle announced by this Court in South Dakota vs. North Carolina, quoting from an opinion by Chief Justice Taney:

> "The award of an execution is a part, and an essential part, of every judgment passed by a Court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

South Dakota vs. North Carolina, 192 U. S. 320;

Borden vs. U. S., 117 U. S. 697.

> "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any farther than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the state law, but under that of the United States, which adopts such law."
>
> Bank vs. Halstead, 10 Wheat. 63-64.

4. There is also a Federal question in that, as is more fully argued *infra*, pp. 6-10, the state laws adopted by the Conformity Act of 1872, (17 Stat. L. 196), respecting executions are, by virtue of that adoption, Federal statutes—wherefore, their construction and effect are for this Court to determine.

All these Federal questions were set up in the answer of the plaintiffs in error to the original bill of defendant in error, (pp. 19-22), were insisted upon specifically in the lower court (p. 107) and made the basis of numerous assignments of error in the Supreme Court of Mississippi (pp. 112-115).

III.

LAWS INVOLVED ARE FEDERAL LAWS AND FEDERAL COURTS NOT CONCLUDED BY DECISIONS OF STATE COURT.

The third ground of the motion to dismiss is that this cause was decided by the Mississippi Supreme Court upon the construction of state statutes as to which the decision of the Mississippi Court is conclusive.

As the Mississippi Supreme Court rendered no opinion, we cannot know upon what ground the decision rested, except by examining the Chancellro's

decree (p. 108,) but it is certain that the only statutes of Mississippi involved were those which were applicable by virtue of the Conformity Act of 1872.

The main question in the case was the validity vel non of the execution sale by the marshal, and, as already shown, that was, of course, *a Federal question to be decided upon Federal Statutes*, and the general principles of Federal jurisprudence. Whatever may be the extent to which the statutes of Mississippi should be considered in determining that question, those statutes are, *pro hac*, Federal statutes.

In Bank vs. Halstead, 10 Wheat. 64, Mr. Justice Thompson, speaking for the Court, said:

> "An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit, and which are expressly, by the act of Congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command."

Bank vs. Halstead, 10 Wheat. 64;

Fink vs. O'Neil, 106 U. S. 272.

In the case of Cook vs. Avery, 147 U. S. 390, the court was considering the rights of a plaintiff who claimed title to land as the purchaser at a sale of such land under a judgment of the Circuit Court of the United States. The validity of his purchase

turned upon the existence of a lien of the judgment upon the land. And this in turn depended upon the effect of the Conformity Act of Congress adopting the state statutes and the subsequent rule of court adopting subsequent acts of the Legislature. In holding that the case, therefore, presented a federal question, although it was the law of Texas whose interpretation and effect were being considered, the court said:

> "It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject-matter was properly invoked."
>
> Cooke vs. Avery, 147 U. S. 390.

The case of Buck vs. Colbath, 3 Wall. 334, was an action of trespass for taking goods, against a marshal, and the "defendant relied solely upon the fact that he was marshal and held the goods under the writ in the attachment suit" issued by the United States District Court. There was judgment against the defendant and he brought the case to this court under the 25th section of the Judiciary Act. In maintaining jurisdiction, the Court said:

> "There seems to be no reason to doubt that the case comes within the provisions of the 25th section of the Judiciary Act. The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the protection thus claimed;

or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the Supreme Court of Minnesota."

Buck vs. Colbath, 3 Wall. 340.

Similar views have been expressed by subordinate Federal courts:

Sowles vs. Witters (C. C.) 46 Fed. Rep. 497;

Files vs. Davis (C. C.) 118 Fed. Rep., 465.

In U. S. vs. Johnson County, 6 Wall. 166, Mr. Justice Clifford, speaking for the Court, said in this connection:

"Congress may adopt state laws for such a purpose (enforcement of a judgment) directly, or confide the authority to adopt them to Federal Courts, but their whole efficacy when adopted depends upon the enactments of Congress; and they are neither controlled or controllable by any state regulation. U. S. vs. Peters, 5 Cranch 136; Boyle vs. Zacharie, 6 Pet. 658."

In Wayman v. Southard, 10 Wheat. 49, Mr. Chief Justice Marshall, in dealing with the question as to whether state laws respecting executions passed subsequent to the Process Act of Congress (which adopted state laws then in existence), would become applicable to Federal courts, declared the proposition unthinkable, because it would mean that the state had the right to regulate proceedings in Federal courts. "No gentleman, we believe, will be so extravagant as to maintain the efficacy of" an

act of the state regulating federal proceedings. "It seems not much less extravagant to maintain that the practice of the Federal courts and the conduct of their officers can be indirectly regulated by the state legislature by an act professing to regulate the proceedings of the state courts and the conduct of the officers who execute the process of those courts."

Wayman vs. Southard, 10 Wheat., 49.

In so far as the statutes of Mississippi are involved here by the Conformity Act, (and they can be involved in no other respect), they are, therefore, Federal laws and a question as to their effect, where an execution from a Federal court is concerned, becomes a Federal question.

———o———

It is argued by defendant in error that this court is bound by the decision of the Mississippi Supreme Court because there is merely a question as to the construction of a state statute.

This court has jurisdiction when the validity of the proceedings under a Federal execution is involved, (Avery vs. Popper, 179 U. S. 134), for the sole reason that the state statutes are, as applied to Federal executions, Federal statutes. It is in that way alone a Federal question arises in such cases.

It must follow, therefore, that this Court is not bound by the decisions of the state courts. For it would be anomalous to say that the court has jurisdiction to review the judgment of the State Court on the application and construction of such statutes and yet is bound by the decision of the state court thereon.

Tullock vs. Mulvane, 184 U. S. 512, quoted supra.

The principles of general law as announced by this Court must, therefore, control here. Among those principles, one is well settled that mere irregularities in execution sales afford no ground for a collateral attack. As to what are irregularities and what are essentials, the rule was declared by this Court in Wheaton vs. Sexton, 4 Wheat. 503, where it is made very clear that the essentials, so far as the purchaser at the execution sale is concerned, are the judgment, the levy and the deed. "All other questions are between the parties to the judgment and the marshal." And in this connection, the opinion of Mr. Justice Baldwin in Bank vs. Voorheis, 10 Pet. 469 is peculiarly valuable.

In the instant case, the validity of the judgment is conceded, the levy and the deed are clearly valid. The whole ground of attack on the sale rests on the fact that it was made at the door of the Federal court house, instead of at the door of the county court house.

Failure to describe the property correctly and failure to have it appraised are mere irregularities.

Robertson vs. Howard, 229 U. S. 254, 264.

And the doctrine of Wheaton vs. Sexton has been expressly approved in Mississippi.

Minor vs. Natchez, 4 S. & M., 619; 10 S. & M., 246.

IV.

DECREE BELOW NECESSARILY DECIDED FEDERAL QUESTIONS.

The fourth ground is that this cause was decided in the Mississippi Supreme Court upon sufficient

grounds other than those involving Federal questions to sustain that decision. As just stated, there was no opinion rendered by the Mississippi Supreme Court, but that court could not possibly have decided the cause as it did, without holding that the sale by the marshal was void. There was no aspect of the case which would admit of a decree for the defendant in error here if the validity of that execution sale had been upheld. For "the regularity of the proceedings under the execution" (179 U. S. 207) was necessarily involved and a decision thereon unavoidable.

It will appear from the statement of the case already made (*infra*, pp. 1-3) that the Chancellor's decree not merely declared the defendant in error here to be the owner of the stock in question but specifically declared null and void all claim to the stock as set up in the case by either the Mississippi Valley Company or the Railroad Company, and affirmatively cancelled such claim of title. That was, of course, an express adjudication that the execution and sale thereunder, on which the Mississippi Valley Company relied, was void.

It, therefore, cannot be true that this cause was decided in the Mississippi Supreme Court upon sufficient grounds other than those involving Federal questions, to sustain that decision.

V.

This ground is in part a repetition of the second ground—being that no Federal question is involved, and that has already been answered. The motion adds, however, that if any Federal question was decided by the State Court, it was correctly decided. This, of course, invites an argument which can properly come only when the merits of the case are reached. It will be sufficient, for the present, to

refer to an opinion by Mr. Justice Baldwin, where the whole subject of the validity of such sales is considered.

Bank vs. Voorheis, 10 Pet. 469.

VI.

VALIDITY OF "AN AUTHORITY EXERCISED UNDER THE UNITED STATES" WAS DRAWN IN QUESTION AND WAS DENIED BY DECREE OF THE STATE COURT.

This ground of the motion is, in effect, that, conceding the existence of a Federal question, the only mode of securing a review in this court is by Certiorari and not by Writ of Error.

This involves the construction and effect of the Act of September 6, 1916, (39 St. L. 726), and creates the inquiry as to whether, by the final decree in the Mississippi Supreme Court, there was drawn in question the validity of an authority exercised under the United States.

That there was drawn in question by the decree of the Supreme Court of Mississippi the validity of an authority exercised under the United States and that the decision was against that validity, seems not to admit of denial. But the question nevertheless arises as to whether this case comes under that part of the Act of September, 1916 (39 Stat. 726), which authorizes a writ of error to the state court "where is drawn in question the validity . . . . an authority exercised under the United States and the decision is against its validity," or whether it comes under the subsequent provision, of that same act, relating to certiorari in cases where "any title, right privilege or immunity is claimed under . . . . authority exercised under the United States."

The defendant in error (complainant below) by its pleadings made a collateral attack upon the validity of an execution sale by a marshal of the United States and based its right to recover this stock upon the proposition that the marshal having the execution made the sale at the door of the wrong court house. There was thus assailed and "drawn in question" the validity of an authority exercised by the marshal under the Federal statute.

The defendants in error filed answers setting up the fact that they claimed under an authority exercised under the United States and this was submitted as a reason why the complainant (defendant in error) should not recover. One of the plaintiffs in error made its answer a cross bill, but at the hearing, and before the decision of the cause by the Chancellor, the claim to any relief under the cross bill was expressly waived (p. 107). There was, therefore, no assertion by these plaintiffs in error (defendants below) of an authority exercised under the United States *for the purpose of obtaining affirmative relief*, but such authority was relied on solely as a defense to the suit against them.

In Tullock vs. Mulvane, 184 U. S. 512, there was a suit in the State Court on an injunction bond which had been given pursuant to a bill in equity filed in the Federal Court. The question was whether this court had jurisdiction to issue a writ of error to review the judgment of the State Court in the action on the injunction bond. The right to this review was claimed by the defendant in that action on the ground that the bond sued on had been given pursuant to a requirement of the Federal Court, and this court, sustaining the jurisdiction, said:

> "For, if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law."

The line is very shadowy between those cases in which it may be said that the decree of the State Court decided against "the validity of an authority exercised under the United States," and those cases in which it decides either for or against "a title, right, privilege or immunity claimed under . . . . an authority exercised under the United States."

For example, in the recent rate cases wherein was involved the question as to whether the Federal government had a right to fix intra-state rates, during Federal control, there was in the North Dakota case, — U. S. —, a peremptory mandamus compelling the railroad company and the Federal Director General of Railroads to desist from collecting intra-state rates other than those fixed by the state. This court entertained a writ of error directed to the Supreme Court of North Dakota. Undoubtedly there was a decision by the State Supreme Court against the validity of an authority exercised under the United States—that authority being conferred by Act of Congress providing for Federal control. At the same time it was equally true that the railroad and the Federal Director General claimed an immunity by virtue of an authority exercised under the United States. If the former view be taken, a writ of error was proper; if the latter view be taken, no writ of error could be allowed, but only a certiorari.

It was with this difficulty in mind that we thought it proper to ask in this case for both a writ of error and certiorari, such course being in accord with the practice where counsel are reasonably in doubt as to the proper remedy.

Farrell vs. O'Brien, 199 U. S. 89;
Montant Min. Co. vs. St. Louis Min. Co. 204 U. S. 213;
Gompers vs. United States, 233 U. S. 604.

In the last named case there was an appeal, a writ of error and a petition for certiorari.

As the case at bar is in this court on a petition for certiorari filed in time and presented in time, it is not a matter of serious importance whether jurisdiction is maintained on the one ground or the other, and in this argument we have merely sought to justify our action in taking both courses.

Respectfully submitted,

H .D. MINOR,
CHAS. N. BURCH,
For Plaintiffs in Error.

BLEWETT LEE,
Of Counsel.

(All italics ours. References are to top pages of printed record).

———o———

I certify that today I mailed, postpaid, copies of the foregoing brief to Messrs. George F. Maynard, Clarksdale, Mississippi; Gerald FitzGerald, Clarksdale, Mississippi, and Frederick S. Tyler, Metropolitan Bank Bldg., Washington, D. C., counsel for the defendant in error.

H. D. MINOR

Memphis, Tennessee, October 11, 1919.

Office Supreme Court, U.S.
FILED
OCT 20 1919
JAMES D. MAHER
CLERK

NO. 4[redacted]1[redacted]15

IN THE

Supreme Court of the United States

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY

Plaintiff in Error.

vs.

CITY OF CLARKSDALE

Defendant in Error.

BRIEF IN REPLY UPON MOTION TO DISMISS.

HEDERMAN BROS., JACKSON.

In the Supreme Court of the United States

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY

Plaintiff in Error

VS. No....

CITY OF CLARKSDALE

Defendant in Error.

BRIEF IN REPLY UPON MOTION TO DISMISS

I.

We submit, with deference, counsel for Plaintiff in Error, in their brief, failed to notice the amendment of Section 237 of the Judicial Code, and, as amended, the construction placed thereon by this Court in its numerous, current decisions; all of which are, with deference, conclusive in favor of Defendant in Error.

II.

Writ of Error not properly allowed under Constitution of Mississippi.

By amendment, Laws 1916, page 209, the Constitution of Mississippi now reads:

> "The Supreme Court shall have power, under such rules and regulations, as it may adopt, to sit in two divisions of three judges each, any two of

> whom, when convened, shall form a quorum; each subdivision shall have **full power to hear and adjudge all causes** that may be assigned to it by the Court. In the event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in the event any judge of either division . . . . . shall certify, in his opinion, any decision of any division of the court is in conflict with any prior decision of the Court, or any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof." (Italics ours.)

It appears from the record (or more properly the supplemental record the contents of which was by inadvertence not supplied by the Clerk in the original record, and, wherefor, if necessary, we shall ask for certiorari) that the Mississippi Supreme Court is now divided into divisions called, respectively, "A" and "B."

Chief Justice Smith presides over Division A and Presiding Justice Cook over Division B. These courts have separate minutes, exercise several and separate authorities, and, when considering a cause, each has, independently of the other "full power to hear and adjudge all causes."

The limitation with reference to a dissenting opinion and with reference to an overruling of a prior decision is not here applicable, because Division B of the Supreme Court of the State of Mississippi, as shown by the record, decided this cause unanimously and affirmed the decision of the lower court without any interposition of Division A of the Supreme Court of the State of Mississippi, and yet, notwithstanding that Chief Justice Smith did not participate in or concur in the affirmance of this decision by "Division B," he has assumed, contrary to

the Constitution, to grant this writ of error, and thereby erred, in this that, full power to hear and adjudge was vested in Division B, over which he, as Chief Justice Smith, has no authority whatsoever.

Writs of error remove the judgment of an inferior court to this Tribunal and are governed by the usages and principles of the common law. **Payne v. Niles**, 20 How., 219.

And, as said in the classic definition of a writ of error in Cohen Virginia, 6 Wheaton, 265:

It is "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and upon such examination, to affirm or reverse the same according to law."

Without a writ of error issued according to law, no jurisdiction vested in this Court. **County v. Durant**, 7 Wallace 694; **Ex Parte Rawlston**, 119 U. S., 613.

As said in **Hodge v. Williams**, 22 Howard, 87:

> "And this court has no appellate jurisdiction over a judgment of the court below, unless the judgment is brought here, according to the Act of Congress—that is, by writ of error, and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not a mere matter of form, but a matter of substance prescribed by law and essential to the jurisdiction of this court."

In Section 999 of the Revised Statutes, the writ of error, when granted, must be signed by "the Chief Justice, or judge, or chancellor of such Court, **rendering the**

judgment . . . . . complained of . . . . ." (Italics ours.)

Here, the allowance was by Chief Justice Smith, who was not the Chief Justice or Judge of the Court rendering the judgment, and therewith had no connection whatsoever. Presiding Justice Cook was the Judge of the Court rendering the judgment complained of; and it was he who signed the minutes and made effective the decision against Plaintiff in Error, and it is he who should, under the statute, have signed and allowed the writ of error.

The record is now in Division B of the Supreme Court of the State of Mississippi and the writ of error should have run to that Division and been allowed by the presiding judge thereof.

Underwood v. McVeigh, 131 U. S., CXIX-Appx., 21 L. ed., 952, the Supreme Court dismissed the writ of error directed to the Corporation Court instead of the Court of Appeals.

In **Atherton v. Fowler,** 91 U. S., 143, it was ruled that the record could be in but one court at a time and the writ must be directed to that court.

Here, the record is in Division B of the Supreme Court of the State of Mississippi.

See, also **Wurtz v. Hoogland,** 105 U. S., 701; **Polleys v. Improvement Co.,** 113 U. S. 81; **Mulcrevey v. San Francisco,** 231 U. S., 669; **Wedding v. Miller,** 192 U. S., 593; **Rothschlid v. Knight,** 184 U. S., 334.

In **Havnor v. New York,** 170 U. S., 408, it was held:

> "A writ of error and a citation signed by an Associate Judge of the New York Court of Ap-

peals, who does not purport to act as Chief Judge or Chief Judge pro tem., is not sufficient under U. S. Rev. Stat. No. 999, to give jurisdiction to the Supreme Court of the United States, although there was an affidavit by counsel that the Chief Judge of the Court is abroad in Europe, and will be for some space of time to come."

This decision was approved in **Missouri Valley Land Company v. Wiese**, 208 U. S., 244.

As stated, the record here shows, that this case was decided by Division B in the Supreme Court of Mississippi, which constitutes an entirely separate judicial tribunal from Division A and the decisions rendered by each division are separate and several from the decision rendered by the other division and there is no authority for one Division to reverse, annul or in any way question a decision of the other division when made by a unanimous court, except when there happens to be a conflict between that decision and a prior decision rendered by the court en banc or by either division thereof. Unless this obtains, the courts are absolutely independent, and, being so independent, here, by reason of that condition not obtaining, this writ of error was improperly and improvidently allowed.

Respectfully submitted,

GERALD FITZ GERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,

For Defendant in Error.

Office Supreme Court, U. S.
FILED
OCT 20 1919
JAMES D. MAHER,
CLERK.

NO. 4[redacted]15

IN THE

Supreme Court of the United States

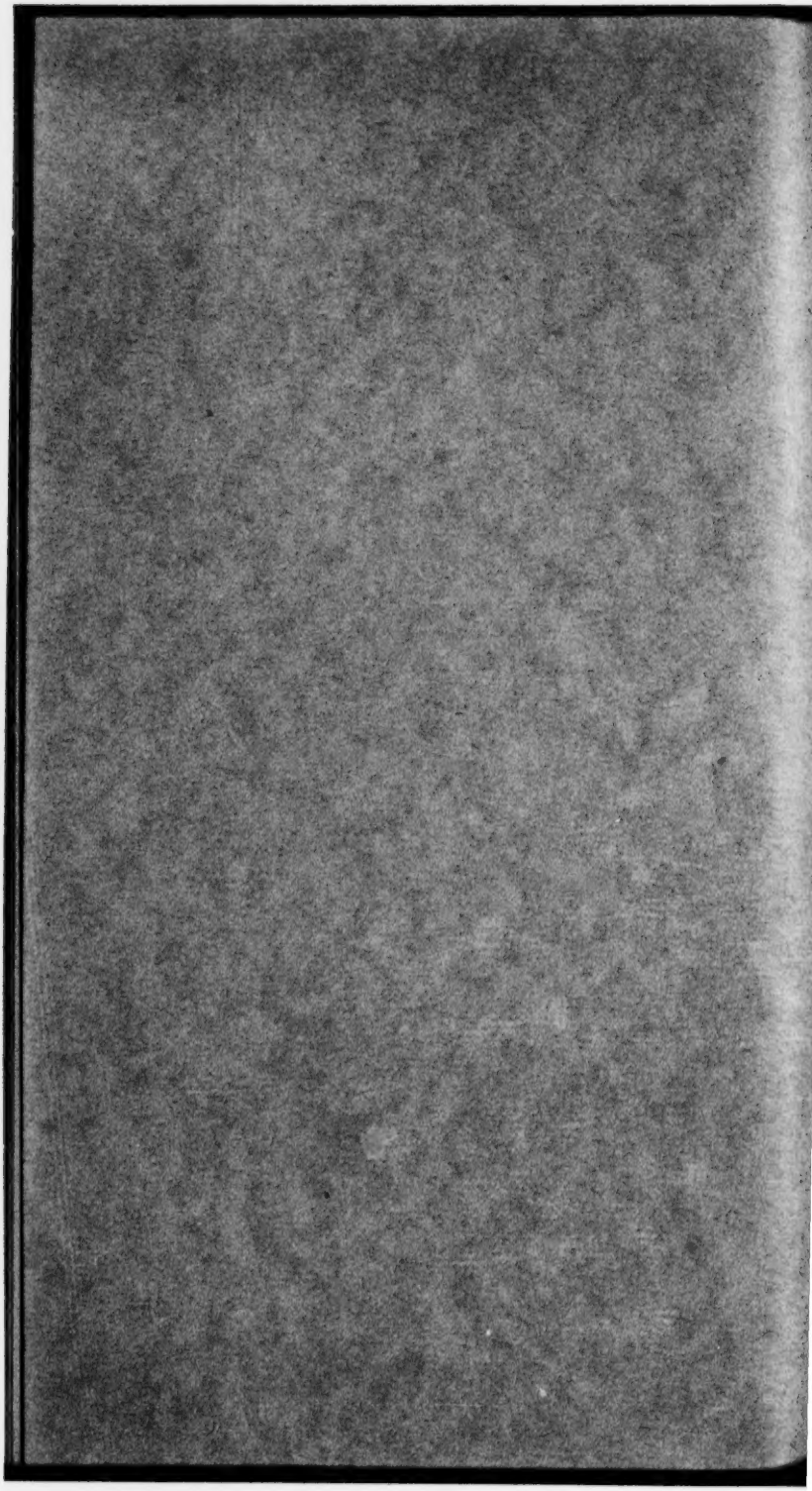
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

CITY OF CLARKSDALE.

SUPPLEMENTAL TRANSCRIPT OF RECORD IN SUPPORT OF MOTION TO DISMISS.

HEDERMAN BROS., JACKSON.



SUPREME COURT OF MISSISSIPPI

OCTOBER TERM A. D., 1915

Monday, January 31st, 1916.

Court met pursuant to adjournment sitting En Banc. Present the Honorable Sydney Smith, Chief Justice, J. Morgan Stevens, John B. Holden, Clayton D. Potter, and Eugene O. Sykes Associate Justices, Geo. C. Myers, Clerk and C. L. Johnson, Marshal.

RULE 34.

Ordered that the following rule for separating the Court into two permanent divisions be and the same is hereby adopted.

Section 1. For the convenient dispatch of business the Court shall be separated into two divisions of three Judges each—one from each district, designated respectively as Division "A" and "B."

Sec. 2. Each of the Judges shall be assigned to one of the divisions by order entered upon the minutes of the Court when sitting in banc, and shall thereafter, during his term of office remain a member of such division unless transferred to the other by order of the Court entered upon the minutes when sitting in banc.

Sec. 3. The Chief Justice shall be the presiding Judge of the division of which he is a member. The presiding Justice of the other division shall be the Judge thereof who has been for the longest time continuously a member of the Court, and in event no Judge of a division

has been continuously a member of the Court for a longer time than the others, the Court shall designate by order entered upon the minutes when sitting in banc, which of the said Judges shall be the presiding Justice thereof. In the absence of the presiding Judge, the Judge of the division who has been for the longest time continuously a member of the Court shall be the acting presiding Judge thereof; and in event the two Judges of a division other than the presiding Justice thereof shall have had the same period of continuous service, the Court shall designate by order entered upon its minutes when sitting in banc, which of the said Judges shall preside in the absence of the presiding Judge.

Sec. 4. Each division, except when prevented by the sitting of the Court in banc, or when the Court in banc shall otherwise direct, shall sit during alternate weeks; the minutes of a division shall be signed by the Judge thereof then presiding.

Sec. 5. The Court in banc may sit on any day of a term without previous notice being given thereof; but when a case is ordered to be argued before the Court in banc, the Clerk, at least one week before the day set for hearing, shall mail a notice to each attorney or firm of attorneys interested therein.

Sec. 6. In event any Judge of either division within fifteen days after a judgment has been rendered, or an order entered by either division, or while a Suggestion of Error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with prior decision of the Court, or of either division thereof, the order or judgment shall be set aside by an order entered on the minutes of the first session thereafter of either the Court en banc or of a division; and the Chief Justice shall cause the full Court, or a quorum thereof, to assemble in conference at a convenient time for the decision of the case; and the judg-

ment agreed on shall be entered at any sitting of the Court en banc.

STATE OF MISSISSIPPI,
HINDS COUNTY:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, and the legal custodian of the records of said Court, do hereby certify that the foregoing is a true and correct copy of Sections 1, 2, 3, 4, 5 and 6 of Rule 34 of said Court Revised and Promulgated on October 14th, 1918, and in force at the March Term, 1919 of said Court; that said rule was adopted by this Court on January 31st, 1916, and appears of record on Minute Book "S" at page 359.

(Seal) Given under my hand, and seal of said Court affixed at office in the City of Jackson this 16th day of October A. D. 1919.

GEO. C. MYERS, Clerk.

Ordered that Judges Sydney Smith, John Burt Holden and Eugene Octave Sykes be assigned to Division "A" and that Judges Sam C. Cook, J. Morgan Stevens and Clayton D. Potter be assigned to Division "B" and that Judge John Burt Holden be and he is hereby designated as the presiding Judge of Division "A" in the absence of the regular presiding Judge thereof.

Ordered that the Court sitting En Banc do now adjourn and the session be continued by Division "A."

(Signed) SYDNEY SMITH, Chief Justice.

Saturday, December 23rd, 1916. October term 1916.

Court met pursuant to adjournment Division "B" sitting. Present Honorable Sam C. Cook, presiding Justice, the Hon. J. Morgan Stevens and the Hon. Clayton D. Potter associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

The Honorable Geo. H. Ethridge having been elected to succeed Judge Clayton D. Potter, took his seat on January 6th, 1917.

Saturday, January 6th, 1917. October term 1916.

The Court met pursuant to adjournment Division "B" sitting. Present the Honorable Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens, the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

March term 1919, Monday, March 3rd, 1919.

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi, begun and held at the Court Room in the City of Jackson, on the first Monday, being the 3rd day of March A. D. 1919, Division "B" sitting; present the Honorable Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens, and the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Yazoo & Mississippi Railroad Company,

20542. Vs.

City of Clarksdale.

Argued orally by H. D. Minor for appellant, and Gerald Fitzgerald for appellee, and submitted on briefs by H. D. Minor and [illegible] N. Burch for appellant and Maynard & Fitzgerald for appellee.

Ordered that Court do now adjourn until 9:30 o'clock Tuesday morning, March 4th, 1919.

(Signed) SAM C. COOK, Presiding Justice.

March term A. D. 1919; Monday, March 31st, 1919.

Court met pursuant to adjournment, Division "B" sitting. Present The Hon. Sam C. Cook presiding Justice, the Hon. J. Morgan Stevens and the Hon. Geo. H. Ethridge associate Justices, Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Yazoo & Mississippi Railroad Company,

20542. Vs.

City of Clarksdale.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Coahoma County, 2nd District, and this Court having sufficiently examined the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 20th day of April, 1918, be and the same is hereby affirmed, and that appellee do have and recover of appellant and D. A. Scott and E. M. Yerger, sureties in the appeal bond the costs of this cause in this Court and in the Court below to be taxed etc.

Ordered that Court do now adjourn until 9:30 o'clock Tuesday morning, April 1st, 1919.

(Signed) SAM C. COOK, Presiding Justice.

STATE OF MISSISSIPPI,

HINDS COUNTY.

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, and the legal custodian of the records of said Court, do hereby certify that the foregoing is a true and correct transcript of the Minutes of the Supreme Court of the State of Mississippi applicable to the organization of Division "B" of said Court, and of the Minutes pertaining to the hearing, submission and decision of that cause lately pending therein, styled Yazoo and Mississippi Valley Railroad Company vs. City of Clarksdale, and now pending in the Supreme Court of the United States on Writ of Error issued from

the United States Supreme Court to the Supreme Court of the State of Mississippi.

(Seal) Given under my hand, and seal of said Court affixed at office in the City of Jackson this 16th day of October A. D. 1919.

GEO. C. MYERS, Clerk.

Clerk's fee for copy, $2.50.

FILED
JUN 26 1919
JAMES D. MAHER
CLERK

No. 402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

CITY OF CLARKSDALE,
Respondent.

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI, AND BRIEF IN SUPPORT THEREOF.

H. D. MINOR,
CHAS. N. BURCH,
Counsel for Petitioners.

BLEWETT LEE,
Of Counsel.

LATSCH & ARNOLD - MEMPHIS

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners,

vs.

CITY OF CLARKSDALE, Respondent.

PETITION FOR CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

(This case is already in this Court by a writ of error allowed by the Chief Justice of the Supreme Court of Mississippi, and this petition for certiorari is filed out of an abundance of caution and in order that all questions in the case may be brought to the attention of this Court. Page references are to the manuscript copy of record. The original petition contains genuine signatures.)

Your petitioners, The Yazoo & Mississippi Valley Railroad Company (hereafter called the Railroad Company) and the Mississippi Valley Company (hereafter called the Valley Company) and D. A. Scott and E. M. Yerger, sureties on the appeal bond, respectfully show that this litigation was commenced by original bill filed by the City of Clarksdale (hereinafter called the City) in the Chancery Court of Coahoma County, Mississippi, against said Railroad Company. The bill was afterwards amended so as to make the Valley Company a defendant; whereupon arose this

QUESTION IN THE CASE.

The validity of an execution sale of corporate stock by the marshal under an execution issuing from the United States Circuit Court pursuant to a valid judgment by that court against the City. Also the right of the City to make a collateral attack on that sale—particularly after a delay and inaction, with knowledge of the facts, for over nineteen years.

THE CASE STATED.

The original bill (pp. 1-19) was filed against the Railroad Company only. It averred that the City was and had been since April 29, 1891, the legal owner of 250 shares of the capital stock of the Louisville, New Orleans & Texas Railway Company, a corporation of Mississippi, of the par value of $100.00 per share, evidenced by certificate No. 147, dated April 21, 1891; that this certificate had been lost or mislaid and could not be found; that the said L. N. O. & T. Ry. Co. had been consolidated with said Railroad Company (the Y. & M. V.) and that said stock was very valuable; that the City had applied to the Railroad Company for recognition of its rights, which had been declined. There was a

prayer for special and general relief. *The bill made no attack upon the execution sale* presently to be mentioned. It did not refer in any way to that sale nor make the purchaser at the sale a party.

The Railroad Company filed an answer (pp. 22-51) admitting that the stock had been issued to the City, the consideration therefor being $25,000 of the 6 per cent bonds of the City, but that the Valley Company was now the owner of the stock by virtue of a purchase in 1904 in good faith from the Pacific Improvement Company, which had purchased the stock on December 6, 1897, *at an execution sale by the United States Marshal pursuant to a judgment against the City rendered by the United States Circuit Court for the Northern District of Mississippi at Oxford, Miss.* The Valley Company had surrendered the original certificate (representing stock in the L. N. O. & T. Ry. Co.) and secured, in lieu, a certificate for an equal amount of the stock of the Railroad Company (the Y. & M. V.). Various other defenses were set up by the Railroad Company, including laches because no step was taken by the City from Dec. 6, 1897 (the date of the execution sale), until March, 1917, when the present bill was filed; estoppel because of inaction, silence and delay and a failure to exercise any remedy in the court issuing the execution; absence of clean hands; and the statute of limitations. This answer was made a cross bill (p. 41), but at the hearing any relief under the cross bill was waived (p. 168).

The City filed an answer to the Railroad Company's cross bill (pp. 53-64) and its only reference to the execution and sale was to deny in formal terms the allegations of the answer and cross bill in respect thereto (p. 57). However, by proper pleading the City brought in the Valley Company as

a co-defendant (p. 63) and the latter company thereupon filed an answer setting forth the same facts and defenses as the answer of the Railroad Company (pp. 65-70).

There was a decree by the Chancellor granting the complaint full relief, including an accounting (pp. 169-173), and this decree was affirmed without opinion by the Supreme Court of Mississippi March 31, 1919 (p. 181). 81 So. Rep. 178.

JUDGMENT AND FI. FA. VALID.

The City conceded, at the hearing, the validity of the judgment under which the execution issued (p. 89) and the formal regularity of the fi. fa. is not denied.

LEVY OF EXECUTION.

The execution was levied by the marshal by seizing the certificate No. 147, representing the 250 shares of stock in question which has been issued to the City, and by notifying the home office of the corporation (pp. 93, 99). The only question made by the City in this connection was (by argument and not by pleading) that a certificate of stock, being mere indicium of ownership, was not subject to levy. The Mississippi Code of 1870 (which was the Code in effect when the Conformity Act of Congress of 1872 was passed) authorized such a levy.

Rev. Code of Miss. (1871), Sec. 849.

For the convenience of the Court, this section is set out in full, *infra*, p. 21.

The Mississippi Code of 1892, which was the Code in effect *at the time of the execution sale*, but which had never been adopted by the U. S. Circuit Court,

provided for the levy of an execution upon corporate stock by the officer's going to the office or principal place of business of the corporation and there declaring that he attaches or levies upon the stock or shares of interest of the defendant therein at the suit of the plaintiff.

Mississippi Code of 1892, Sec. 3467.

PLACE OF EXECUTION SALE.

The principal, if not the sole, reliance of the City is on the proposition (made in argument and not by pleading) that the execution sale is void because made at the wrong place, for that it was made at the United States Court House in Oxford, Miss., whereas the State statute provided that execution sales must be made "at the court house of the county."

RETURNS ON EXECUTIONS.

The return of the marshal showed his proceedings under the execution and was as follows (p. 93):

> "Executed the within writ this the 13th day of August, 1897, by levying on and taking into my possession one Certificate of stock, the property of said defendant in the Louisville, New Orleans and Texas R. R., Number 147, for 250 shares, issued to the town or city of Clarksdale, Miss. Further executed on this the 6th day of December, 1897, at 12 o'clock meridian by selling said certificate of Stock No. 147 after due advertisement by posting notices in three public places for the period of 10 days as provided by law, to the highest and best bidder for cash, before the Western door of the United States Court House, and post office building in the town of Oxford, Miss., at which sale the Pacific Improvement Co. became the highest and best

bidder, at and for the price of $100.00 and at the same time and place I executed the writ of *vendi exponas* issued to me in this cause and offered for sale all the interest which the City or Town of Clarksdale (Continuation of Marshal's return) had in the Capital Stock of the Louisville, New Orleans & Texas Railway Co. or in the Yazoo & Mississippi Valley Railroad Company, offering said interest at the same time with said certificate of stock to the said Pacific Investment for the said sum of $100.00, that being the highest and best bid offered for same. Dec. 6th, 1897."

Record, p. 93.

A duplicate fi. fa. addressed to the marshal for the Southern District of Mississippi had been issued (p. 96), on which this return was (p. 99):

"Received at Jackson, August 13, 1897, and executed same day by going to the office of the Yazoo & Mississippi Valley Railroad Company in Jackson and there declaring that I attached as levied upon the stock, shares and interests of defendant therein; further by delivering to George Gordin, Agent of the said Yazoo & Mississippi Valley Railroad Company, a true copy of this writ, and demanding of him, by instrument of writing delivered to him, a statement in writing under oath of the amount of the defendant's stock, the number of its shares, and extent of its interest in said railroad company."

(At that time the consolidation of the L. N. O. & T. with the Y. & M. V. had been in effect for some years).

EQUITABLE DEFENSES.

The origin of the whole matter was that, when the L. N. O. & T. Ry. Co. was about to build its Tallahatchie Branch, the City, in order to have that line touch its borders, agreed to take $25,000 of the L. N. O. & T. Ry. Co. stock and pay therefor with $25,000 of its 6 per cent bonds. The line was built in accordance with this agreement, the bonds were issued and the exchange of bonds for stock took place in due course. These bonds passed into the hands of the Pacific Improvement Co. and R. T. Wilson & Co. The City promptly defaulted in the payment of interest and in 1894 the bondholders brought suit against the City in the U. S. Circuit Court at Oxford, Miss., to recover on past due interest coupons. After a prolonged litigation, the case twice going to the Circuit Court of Appeals (74 Fed. Rep. 528; 81 Fed. Rep. 329), there was a final judgment against the City and in favor of the Pacific Improvement Co. for $3,058.13 (p. 89).

In August, 1897, the judgment not being paid, the plaintiff, Pacific Improvement Co., took out an original fi. fa. (p. 90), which was levied on the certificate (No. 147) which represented the 250 shares of stock issued to the City. At the same time, a duplicate fi. fa. issued to the marshal of the Southern District of Mississippi (p. 96). Under these executions, the certificate of stock and all the interest of the City in the L. N. O. & T. Ry. Co. was sold by the marshal at public vendue at the western door of the United States Court House (p. 93), where it was bought in by the Pacific Improvement Co., plaintiff in the execution, for $100.00. (It appears that, at that time, the stock was regarded as of practically no value—p. 122-3). The marshal thereupon de-

livered this certificate to the Pacific Improvement Co., indorsing on the back thereof a formal transfer to that company (p. 77).

Shortly after the judgment was rendered in June, 1897, the officers of the City, apprehending a mandamus, resigned, and the municipal organization was completely disrupted (pp. 117-18). At a mass meeting of citizens a committee of three was appointed to go to New York and settle, if practicable, the whole matter with the bondholders (pp. 117 et seq.). As a result, an agreement was reached in New York by which the bondholders transferred the bonds and also the judgment to the Planters Bank of Clarksdale in consideration of the cash payment of $25,000 (pp. 160-164). Immediately, the governor appointed new officials for the City and the municipal organization was restored. At the first council meeting, the action of the committee in New York was ratified and the City made an agreement by which it was arranged to reimburse the Planters Bank for the money it had expended (pp. 107-114). All of this occurred in the latter part of June and the early part of July, 1898 (pp. 113-114). Mr. J. W. Cutrer, one of the committee mentioned, and a lawyer of recognized ability (p. 119), represented the City in the litigation heretofore referred to, was elected City Attorney (a public office) upon the reorganization in June, 1898, and remained such for many years thereafter (p. 119). He, of course, was cognizant of all that had occurred. He was never called as a witness by the City at the trial of the present case.

As a result of this adjustment, the bondholders lost, and the City escaped the payment of, over $13,000 of accrued interest.

From the time of the execution sale in December, 1897, nothing whatever was done by the City until

the filing of the present bill in March, 1917, except that two or three former Mayors of the City testified on the hearing of this case that they made inquiries about this stock (pp. 130-136). There is no claim that either the Railroad Company or the Valley Company were ever approached on the subject until about the time the bill was filed in 1917.

During that interval the Valley Company purchased the stock in question from the Pacific Investment Co. in 1904, surrendering the certificate No. 147 (which represented stock in the L. N. O. & T. Ry. Co.) and secured instead a certificate for an equal amount of stock in the Railroad Company, with which the L. N. O. & T. Ry. Co. had been consolidated in 1892, shortly after the original issuance of the stock (p. 105).

In that interval, Mr. W. A. Percy, who represented the bondholders in the litigation in the Circuit Court of the United States at Oxford, died, his death occurring about 1914 (p. 120).

There was no effort by the City to show that it had attempted to pursue any remedy whatever in the Court from which the execution issued.

SPECIFICATION OF ERRORS.

Your petitioners now aver the following plain errors were committed by the Mississippi Supreme Court in its final decree of this case:

1. In adjudging that the execution sale under which the Valley Company's vendor (the Pacific Improvement Co.) acquired title to the stock in question, was void and, therefore, subject to collateral attack, in refusing to dismiss the bill; and in adjudging costs against petitioners.

2. In adjudging that the applicable law respecting said execution sale was not the Act of Congress of March 3, 1893 (27 Stat. L. 751) under which a sale at the Federal Court House door instead of the county court house door is an irregularity merely, but that the controlling statute was the Mississippi statute under which an execution sale at a place other than the county court house is void.

3. In refusing to adjudge that the failure of the City to exercise its remedies in the court issuing said execution (one of which remedies had not long before been pointed out by Mr. Justice Lamar in Bornemann v. Norris, 47 Fed. Rep. 438) was a bar to the City's rights to maintain this bill filed nearly 20 years after the execution sale.

4. In adjudging that the City (the complainant) was not estopped by laches and by silence, although the execution sale occurred December 6, 1897, and no step was taken by the City to assert its right until the filing of the original bill herein in March, 1917—nearly twenty years later, during a large part of which time the official city attorney was a lawyer of ability, who had represented the city in the original litigation which had resulted in the execution and therefore knew all the facts.

5. In adjudging that the City was not precluded from relief in a court of equity by the maxim of "clean hands," when the facts were that the City had gotten this stock by issuing $25,000 of its bonds, had promptly failed to pay the interest thereon and, after a judgment establishing its liability, had sought to escape payments by dissolving its corporate organization—as the result of all of which it practically forced the bondholders to a settlement under which they lost, and the City escaped the payment of, over $13,000 of unpaid past due interest.

6. In adjudging that the City made sufficient proof of its title to the stock in question to enable it to maintain this suit, when, in fact, a serious doubt existed as to its title. For when the committee representing the citizens of Clarksdale went to New York to meet the bondholders, with a view to settlement, at least one of the committee, Mr. Cutrer, was thoroughly cognizant of all the facts and knew that the Pacific Improvement Co. claimed and actually held the stock by virtue of the execution sale. In the settlement reached (which was promptly ratified and adopted by the City—p. 108 et seq.), nothing whatever was said about the stock and the City allowed, without protest, the Pacific Improvement Co. to retain the stock and made no complaint until nineteen years later, when this bill was filed. All this raises a fair presumption that all parties intended that the Pacific Improvement Co. should retain the stock and that the City waived any claim it may have had—thus creating such a doubt with respect to the City's title to the stock as will preclude it from maintaining its bill.

PRAYER.

Your petitioners refer to the certified copy of the record and all the proceedings in this cause now on file in this Court under the writ of error already sued out from this court to the Supreme Court of Mississippi in this cause, and pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Mississippi and the judges thereof, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of said Mississippi Supreme Court in this cause entitled "The Yazoo & Mississippi Valley Railroad Company and Mississippi Valley Company v. City of Clarksdale," and being No. 20542 on the

docket of said Mississippi Supreme Court, to the end that this cause may be reviewed and determined by this court. And your petitioners further pray that the record and proceedings already on file in this court, under the writ of error heretofore granted, may be taken as a return to said writ of certiorari, and that your petitioners may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the decree of the Mississippi Supreme Court in this cause and every part thereof be reversed by this Honorable Court and remanded to the Supreme Court of Mississippi with direction to dismiss the original bill herein.

And your petitioners will ever pray, etc.

H. D. MINOR,

CHAS. N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE,
Of Counsel.

H. D. Minor, being duly sworn, says that he is one of counsel for petitioners in the above cause, that he prepared the foregoing petition and that the allegations therein are true as he verily believes.

H. D. MINOR.

Subscribed and sworn to before me on this the 2nd day of June, A. D. 1919.

E. C. TURNER, Notary Public.
My commission expires Jan. 17, 1923.

I certify that in my opinion the foregoing petition is well founded in law.

H. D. MINOR,
Solicitor for Petitioners.

BRIEF.

1. The case at bar presents a federal question for that there is involved the validity and effect of an execution sale made pursuant to a judgment of the Circuit Court of the United States for the Northern District of Mississippi under an execution issued by that Court. There is also involved the application, interpretation and effect of the Act of Congress of March 3, 1893 (27 Stat. L. 751). These federal questions were presented to the trial court and also insisted upon in the Supreme Court of Mississippi.

Tullock v. Mulvane, 184 U. S. 497;
Cooke v. Avery, 148 U. S 390;
Clements v. Berry, 11 How. 398;
Gregory v. McVeigh, 23 Wall. 294;
Record, pp. 35-36, 69, 168, 176-180.

2. The judgment pursuant to which this execution sale was made was concededly valid and was rendered by a federal court (p. 89) and there is no claim that the fi. fa. was irregular or invalid. On the contrary, it affirmatively appears that the fi. fa. and duplicate fi. fa. under which the execution sale was made, are regular on their face.

Record, pp, 90, 96.

3. The right to levy an execution on this certificate of stock existed under the Mississippi Code of 1871 (the Code in effect when the federal conformity act of 1872 was passed) and by virtue of the Act of Congress (the Conformity Act) of June 1, 1872 (R. S., Sec. 916). The Mississippi Code of 1892 is not applicable because there is no proof that any Mississippi statute subsequent to 1872 was adopted by any "general rules" of the federal court issuing the execution or otherwise. The existence of such rules has not been proven and cannot be presumed.

Rev. Code of Miss. (1871), Sec. 849;
Boyle v. Zachrie, 6 Pet. 659;
Gen. Electric Co. v. Hurd, 171 Fed. Rep. 984.

4. The fact that the execution sale took place at the door of the Federal Court house instead of the door of the court house of the county—the latter being the place for execution sales under the Mississippi statute—does not render the execution sale void, for that the law governing the place of sale under the federal execution is the Act of Congress of March 3, 1893 (2 Stat. L. 751) and not the Mississippi statute, because that act of Congress contemplates judicial sales and was designed to fix a uniform rule for judicial sales under decrees or judgments of federal courts. And an execution sale is a judicial sale.

3 *U. S. Comp. Stat.* (Ann.) 1916, Sec. 640-41;
Re Brittania Mining Co., 203 Fed. Rep. 452;
Piano Co. v. Hennington, 98 Miss. 51;
Seymour v. Association, 116 Ga. 285.

5. While the Act of Congress of March 3, 1893, provides that judicial sales shall be made at the court house of the county, the fact that this execution sale was made at the front door of the federal court house in the county does not render the execution sale void but, at most, was an irregularity which cannot be available to collateral attack. The statutory requirement as to place of sale was directory and not mandatory.

Lansburgh v. M'Cormick (C. C. A.), 224 Fed. Rep, 879;
Street v. Larkin, 77 Ala. 580.

6. The claim of defendant in error that the execution sale in question at which the vendor of the present holders of the stock acquired title was void

because of a failure to advertise the sale as required by statute, is not sound for that a failure to follow strictly the statutory requirement as to advertisement is a mere irregularity which would not be available on collateral attack. The provisions of the statute in that respect are directory purely. Such is the well established rule even in Mississippi.

Cole v. Bridges, 45 Miss. 257;
Nevada Syndicate v. Nickel Co., 103 Fed. Rep. 396, affirmed 112 Fed. Rep. 44, 184 U. S. 700;
McBride v. Gwynne, 33 Fed. Rep., 202;
Rounsaville v. Hazen, 33 Kan. 71, 76;
Conley v. Redwine (Ga.), 35 S. E. Rep. 92;
Doe v. Jackson, 51 Ala. 514, 517.

7. The purchaser at an execution sale depends on the judgment, the levy and the transfer of the stock certificate to him by the marshal. "All other question are between the parties to the judgment and the marshal."

Wheaton v. Sexton, 4 Wheat. 503.

8. The original and amended bill in this cause is a collateral attack on the execution sale in question, the plaintiff in the execution and the purchaser at that sale not being before the court and no direct assault being made in any pleading upon the irregularity of said sale. The irregularities in the execution sale are not available on collateral attack.

Lansburgh v. M'Cormick (C. C. A.), 224 Fed. Rep. 879;
Rounsaville v. Hazen, 33 Kan. 71, 76;
Keystone Collieries v. Mudge, 256 Pa. 130;
1 *Am. Law Rep. Ann.* (1919) 1433.

9. The execution sale in question being pursuant to a judgment of the United States Circuit Court, the remedy of the defendant in the execution was by a proceeding in that court, a remedy which has been pointed out by Mr. Justice Lamar only a few years before the sale (Bornemann v. Norris, 47 Fed. Rep. 438). The failure of the defendant in error here (the defendant in the execution) to pursue that remedy or to exercise any other remedy in the federal court within a reasonable time is and was a bar to the present suit.

Bornemann v. Norris, 47 Fed. Rep. 438;
Seaman v. Ins. Co. (C. C. A.), 86 Fed. Rep. 493;
Kirk v. Hamilton, 102 U. S. 68;
Cunningham v. Cassidy, 17 N. Y. 282;
Quarles v. Hearn, 70 Miss. 895.

10. Where the purchaser at the execution sale fails to avail himself of the remedies in the court issuing the execution or elsewhere, but remains silent, he will not be heard after a long lapse of time, and after intervening rights have accrued, to aver that the execution sale was void. In the case at bar the execution sale occurred December 6, 1897. The plaintiff in error, the Mississippi Valley Company, purchased the stock in 1904 from the purchaser at the execution sale. Nothing was done by the City, defendant in the execution, until the filing of the present bill in March, 1917—nearly 20 years after the execution sale.

Record, pp. 19, 93, 134.
Griffith v. Bogert, 18 How. (U. S.) 158;
U. S. v. Lane, 39 Sup. Ct. Rep. 294;
Nat. Nickel Co. v. Nevada (C. C. A.), 112 Fed. Rep. 44, 48.
Harrington v. O'Reilly, 9 S. & M. 218.

11. An execution defendant who accepts any part of the proceeds of the execution sale, either directly or indirectly, (in this case by credit on the cost bill) or in any other way acquiesces in the sale, is thereby estopped from questioning the validity of the sale, and this is true whether the sale be void or merely invalid for "it is a well-settled elementary principle that a void judicial sale is an exception to the rule that 'a confirmation or ratification cannot strengthen a void estate.' "

Fallon v. Worthington, 13 Colo. 569;
Freeman on Void Judicial Sales, sec. 50;
Kleber's Void Jud. & Ex'n Sales, secs. 474, 476;
Clark v. Glos, 180 Ill., 568.

12. Where a sale is made under several executions, the sale is valid if good under any of them.

Pickett v. Bank, S. & M. (Miss.) 470;
Lane v. McLian, 9 S. & M. (Miss.) 287;
Hand v. Grant, 10 S. & M. (Miss.) 517;
Shepherd v. Dolph, (Ky.) 58 S. W. 991.

13. In order to maintain a bill of the character here involved, complaint must show a perfect legal or a perfect equitable title and failing to do so, the bill must be dismissed without regard to whether the title of the defendant be good or bad.

Jones v. Rogers, 85 Miss. 803;
Bank v. Evans, 10 S. & M. (Miss.) 35.

(a) Conceding for the moment, and for the sake of argument only, the City's contentions as to the invalidity of the execution sale, there clearly remains a doubt whether the Pacific Improvement Company's right to retain the stock was impliedly conceded and the City's claim thereto waived by

the settlement reached in New York by a committee, and afterwards ratified by the City, under which the bondholders lost over $13,000 of accrued interest, due by the City, at which settlement the matter of this stock was not mentioned, but the fact was that the Pacific Improvement Co. was then holding and claiming the stock, which fact was then well known to one of the committee (Mr. Cutrer), who had been attorney for the City in the litigation resulting in the execution and who was the City's official attorney for many years afterward.

Record, pp. 111-113, 119.

(b) The inaction of the City for nearly twenty years after the execution sale, and after the settlement referred to, during most of which time the attorney who represented the City in the litigation which resulted in the execution, was the official city attorney, is explainable upon no other theory than that it was understood by the parties that, by the settlement mentioned, the City abandoned its claim to the stock and thus created, at the least, a serious doubt, as to complainant's title.

Record, p. 119.

14. The complainant (defendant in error) came not with clean hands for that the City repudiated its bonds which it had given for the stock, contested for several years a suit on the bonds and, when judgment was rendered for interest due thereon—thus establishing the validity of the bonds—the City disrupted its organization to avoid a mandamus. By these means it forced the bondholders to a settlement by which they lost over $13,000 of accrued interest. Under such circumstances complainant will be repelled in a court of equity.

Record, p. 113.

Galloway v. Finley, 12 Pet. 264.

15. In its ownership of this stock the City was not acting in a governmental capacity, but as an individual. This rule is well settled with respect to Mississippi municipalities.

Adams v. Railroad, 76 Miss. 714;
Hinds Co. v. Railroad, 85 Miss. 631.

The City was therefore subject to the rules just stated with respect to laches and estoppel.

We, therefore, respectfully submit that the case should be reversed and remanded to the Supreme Court of Mississippi with directions to dismiss the bill.

H. D. MINOR,

CHAS. N. BURCH,

For Petitioners.

BLEWETT LEE,

Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners.

vs.

CITY OF CLARKSDALE, Respondent.
IN RE: PETITION TO SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI IN ABOVE CASE.

To Messrs. Maynard & Fitzgerald,
Clarksdale, Miss.

Please take notice that on Monday, October 6, 1919, at noon, or as soon thereafter as counsel may be heard, the foregoing petition and brief will be submitted to the Supreme Court of the United States at its usual place for holding its session at the Capitol at Washington, D. C., for its consideration and action.

H. D. MINOR,
Attorney for Petitioners.

We acknowledge service of a copy of the foregoing petition, brief, and notice, this June —, 1919.

.....

Attorneys for City of Clarksdale.

"Sec. 849. Bank notes, bills, or evidences of debt, circulating as money, or any share or interest in any incorporated company, belonging to the defendant in execution, may be taken and sold, by virtue of an execution, in the same manner as goods and chattels, or applied to the payment of the execution; and the clerk, cashier, or other officer having the custody of the books of the company, shall, upon exhibiting to him the writ of execution, be bound to give to the officer having such writ, a certificate of the number of shares or amount of the interest held by the defendant in such company, and if he shall neglect or refuse to do so, or if he shall wilfully give a false certificate thereof, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect or false certificates, to be recovered in an action on the case against him. The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant."

Revised Code of Miss. (1871), Sec. 849.

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Office Supreme Court, U. S.
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JAMES D. MAHER,

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

NO. 4[redacted]15

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY;

MISSISSIPPI VALLEY COMPANY;

D. A. SCOTT, and

E. M. YERGER, Plaintiffs in Error.

vs.

THE CITY OF CLARKSDALE, Respondent.

MOTION TO DISMISS THE PETITION FOR WRIT OF CERTIORARI AND BRIEF THEREON.

GERALD FITZGERALD
GEORGE F. MAYNARD
Solicitors for Respondent.

THE CHALLENGE, CLARKSDALE, MISS.

LIST OF CASES CITED IN BRIEF.

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Moody vs. Moeller, 13 Am. St. Rep. 839	10
Merchants Bank vs. Evans, 51 Mo. 343	10
Miss. Constitution, 1890, Sec. 104	13
Page vs. Turk, 43 Okla. 675 (143 Pac. 1049)	10
Phila. & Reading Coal & Iron Co. vs.Gilbert, 245 U. S. 162	8-12

venient place; and, cattle, sheep, or stock,

Sinclair vs. Stanley, 64 Tex. 67 ---------- 10
Smith vs. Cockerill, 6 Wall. 756 ---------- 10
Smith vs. Vulcan Iron Works, 165 U. S. 518 13

Tolbert vs. State Bank, 30 Okla. 407 (121 Pac. 212) ---------- 10

Webster vs. Cooper, 14 How. 488 -------- 11

IN THE SUPREME COURT OF THE UNITED STATES.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners,

vs.

The CITY OF CLARKSDALE, Respondent.

IN RE: MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

Now comes the respondent, by its solicitors, and moves the Court to dismiss the petition for Writ of Certiorari herein because:

First: In this cause there has been no final judgment or decree rendered or passed by the highest Court of the state in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and that decision is not in favor of their validity, nor has there been drawn in question in this cause the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, the decision being against their validity; Nor is there

in this cause any title, right, privilege or immunity claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States, espcially set up or claimed by either party.

Second: There is no Federal question involved in this cause.

Third: This cause was decided upon the construction of State Statutes upon which the decision of the State Supreme Court is conclusive.

Fourth: This cause was decided upon sufficient grounds upon which to base the decision regardless of any Federal questions involved.

Fifth: No Federal question was decided in this cause; and, if decided, then within the law.

Sixth: If any right, title, privilege, or immunity claimed under the constitution or any treaty or statute or commission held or authority exercised under the United States, is involved in this cause then same was not "espcially set up or claimed" by petitioners.

Seventh: The only Federal question which it is claimed to be involved in this cause is stated in specification of error No. 2, p. 10 of the petition of Certiorari, to-wit: (Miss. Supreme Court erred in its final decree) "2. In adjudging that the applicable law respecting said execution sale was not the Act of Congress of March 3, 1893 (27 St.L. 751) under which a sale at the Federal Court House door, instead of the county Court House door is an irrgularity, merely, but that the control-

ling statute was the Mississippi statute under which an execution sale at a place other than the county court house is void." And said specification of error is plainly patent to be without merit as shown by the face of the petition.

Eighth: The error assigned is frivolous and not of sufficient importance to the merits of the case to cause the issuance of a Writ of Certiorari from the Supreme Court of the United States.

Ninth: And for other apparent reasons.

Respectfully submitted,

GEO. F. MAYNARD

GERALD FITZGERALD

To the Hons. Chas. N. Burch and H. D. Minor, solicitors for petitioners; the Yazoo & Mississippi Valley Railroad Co.; the Mississippi Valley Company; D. A. Scott and E. M. Yerger, petitioners:

You wil please take notice that in answer to your petition for Certiorari to be addressed to the Supreme Court of Mississippi in the case of the Yazoo & Mississippi Valley Railrad Company, et al., Petitioners, vs. City of Clarksdale, Respondent, that the respondent will, on Monday, October 6, 1919, at noon, or as soon thereafter as counsel may be heard, submit the foregoing motion to dismiss the said petition for Writ of Certiorari and for a denial of the same.

GEO. F. MAYNARD

GERALD FITZGERALD

Solicitors for Respondent.

STATEMENT OF THE CASE AND BRIEF.

There is involved in this cause the title to two hundred and fifty (250) shares of the stock of the L., N. O. & T. Ry. Company, now consolidted with the Yazoo & Mississippi Valley Railroad Company, issued to the City of Clarksdale on April 29, 1891. The original bill was filed against the Yazoo & Mississippi Valley Railroad Co. asking for the reissuance of this stock and alleging that the same had been lost, destroyed or stolen. The defendants, the Yazoo & Mississippi Valley Rail road Company, answered, admitting the ownership of the stock in the City of Clarksdale up to the date of December 6, 1897, upon which date it was alleged by the defendant railroad company that the said stock was sold by the Marshal of the United States Circuit Court for the Northern District of the State of Mississippi at Oxford, Mississippi,in front of the Federal Court building by virtue of an execution issued on a valid judgment against the said City of Clarksdale; and that the Mississippi Valley Company, a holding corporation, owner of the Yazoo & Mississippi Valley Railroad Company, had since purchased said stock and was at the date of suit the owner thereof.

The cause thereupon went to trial and upon the introduction of the returns of the execution, the City of Clarksdale, admitting the validity of the judgment, attacked the sale collaterally for the following reasons:

To the execution marked exhibit "HDM No. 2",

record page 54, the following objections were made:

"First, that the return on said execution does not show proper levy; Second, that the return on its face shows that the property levied on was sold at the wrong time and wrong place and in an improper manner; Third, that the return attempts to show the execution of a writ of venditioni exponas on which paper alone the return could be made, and because the return is truly and absolutely void as to the actual sale and delivery of any of the share, interest or stock of the City of Clarksdale in and to the L., N. O. & T. Ry. Co. or the Y. & M. V. Rilroad Co.; because the return is not in conformity with the statutes of the State of Mississippi in regard to the levy and sale of such property in any respect; because the return does not show any authority by law to make such a levy as is alleged to have been made or to make such a sale as is attempted to be shown by the return." (Record P. 57.)

To the execution marked "HDM No. 6", page 58 of the record, the City of Clarksdale made the following objections, (rec. p. 60):

"Because the paper is incompetent, immaterial and irrelevant; because the return does not show any sale; because the return is made or proposed to be made by Deputy United States Marshal of the Southern District of Mississippi, and no sale is alleged to have been made by him; because no levy is shown by the execution as required by the Statutes of Mississippi or the law in force at the time as acknowledged and acted upon by the United States Court in the districts of Mississippi;

because the return is void except as a return "nulla bona" ad shows on its face that no action was taken by the officer."

Upon these objections, the Chancery Court of Coahma County, Mississippi, before whom the case was then being tried, ruled the evidence out and gave judgment in favor of the complainant for the possession of the stock. The case was thereupon appealed to the Supreme Court of the State of Mississippi and affirmed without opinion. Whereupon, the petitioners, defendants as aforesaid, have prayed this court for a Writ of Certiorari to be addressed to the Supreme Court of the State of Mississippi.

In praying for the Writ of Certiorari, the sole Federal question alleged is as follows: (The Supreme Court of Mississippi erred)

"No. 2. In adjudging that the applicable law respecting said execution and sale was not the Act of Congress of March 3, 1893 (27 stat. L. 751), under which a sale at the Federal Court House door instead of the county Court House door is an irregularity, merely, but that the controlling statute was the Mississippi statute under which an execution sale at a place other than the County Court House is void."

The Act referred to is as follows:

"An act to regulate the manner in which property shall be sold under order or decree of any United States Court.

Sec. 1. (Real estate, how sold under order or

decree of Court) That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the Court House of the county, parish or city in which the property or the greater part thereof is located, or upon the premises as the Court rendering such order or decree may direct.

Sec. 2. (Personal property) That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the Court rendering such order or decree, it would be best to sell it in some other manner."

Record pages hereinafter referred to are pages of the record in No. 402, October Term, 1919, being the record sent up on Writ of Error in this same cause.

As counsel makes no other specifications of error upon which the Supreme Court of the United States can base the issuance of a Writ of Certiorari, we will base our entire argument on his second specification, page 10 of the petition for Certiorari above quoted, and not seek to follow him in his peregrinations through the mazes of his so-called equitable reasoning.

Under the Act of September 6, 1916, chapter 448, 39 Stat. L. 726 amending section 237 of the Judicial Code it is provided that a "final judgment or decree in any suit in the highest Court of the State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or a statute of, or authority exercised under the United States; and the decision is against their validity, or where is drawn in question the validity

of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of the validity "that the same might be re-examined and reviewed or affirmed in this Court upon a Writ of Error; but only where "any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under the United States and the decision is either in favor of or against the title, right, privilege or immunity, especially set up or claimed, by either party, under such constitution, treaty, etc." Can this Court examine and disaffirm or reaffirm a decision of the State Supreme Court by Writ of Certiorari?

"The difference between the two modes of securing the review as contemplated by the statutes lies in the fact that a Writ of Error is granted as of right, while a Writ of Certiorari is granted or refused in the exercise of sound discretion."

Reading Coal & Iron Co. vs. Gilbert, 245 U. S. 162

In exercising the sound discretion spoken of by Justice Vandevanter in the Reading Coal & Iron Co. case, this Court must ncessarily in considering the petitin for Certiorari examine somewhat the grounds upon which the petition is based. And unless the grounds set forth in the petition are of sufficiently grave a nature to warrant the issuance of this unusual writ, the petition will be denied.

Specifications of error No. 2, page 10 of the petition is on its face a frivolous assignment of error.

The Act of March 3, 1893, Chap. 225, 27 Stat. L. 751 has no application whatever to a sale of

ands or personal property under execution, but is merely an act to regulate the manner in which property shall be sold under **order** or **decree** of any United States Court. The United States Court made no order or decree in this cause as shown by the Clerk's certificate (Record p. 93) so that if the above statute did apply, which of course it does not, the sale would still have had to have been made at the county Court House and not in front of the Federal Court building. As will be seen upon examination, this statute is no part of the common law procedure nor is it incorporated in the Judicial Code as compiled March 3, 1911. As said by the Court in re: LaFrace Copper Co. 205 Fed. Rep. 207, "The Act of March 3, 1893, R. S. 751, seems to relate to judicial sales pursuant to some order or decree, creating or declaring the right to sell and which right could not be exercised but for the order or decree; sales necessarily authorized and ordered by the Court; sales void but for such order or decree; sales divesting the title of the former owner."

And in the case of Landsburg vs. McCormick, 224 Fed. Rep. 874, the Court said:

> "Indeed the Court recognizes and distinguishes the case of Godchaux vs. Morris. The cases holding sales made by merely ministerial officers at a place not authorized by statute to be void obviously stand on a different foting."

We submit, on the whole, that it is too plain for argument to this Court that the Act of March 3, 1893, sec. 751 R. S. has no reference whatever to sales made under execution, but only refers to

sales made under order or decree of any United States Court.

The cause below was tried upon the objections hereinabove stated to the evidence of the sale made by the Marshal under the Mississippi Statutes with reference to sales made under execution. The Lower Court and the Supreme Court of Mississippi in construing the State Statutes held that a sale of personal property made in front of the Federal Court House instead of the County Court House by virtue of execution issued and in the absence of any order or decree was utterly and absolutely void and subject to collateral attack, and they had as their authority the following cases:

Cole vs. Bridges, 45 Miss. 257.

Jones vs. Rogers, 85 Miss. 802.

Moody vs. Moeller, 13 Am. St. Rep. 839.

Sinclair vs. Stanley, 64 Tex. p. 67.

Smith vs. Cockerill, 6 Wallace 756.

Angel vs. Byers, 153 Ky. 214. (154 SW 1111)

Page vs. Turk, 43 Okla. 675. (143 Pac. 1049)

Talbert vs. State Bank, 30 Okla. 407. (121 Pac. 212)

Hancock vs. Youree, 25 Okla. 463. (106 Pac. 842)

Merchants Bank vs. Evans, 51 Mo. 343.

Capital Bank vs. Huntoon, 35 Kan. 592. (11 Pac. Rep. 377)

"Under the laws of the United States re-

lating to the sales of property taken under execution in commn law cases pending in the Circuit Court, defendant in execution is entitled to have the sale of land seized under execution made at the door of the Court House of the county in which it is situated."

Borneman vs. Norris, 47 Fed. Rep. 438.

The only question involved in this cause is the construction of the state statute by the State Supreme Court and such construction is binding upon the Supreme Court of the United States unless some act of Congress is opposed thereto.

"Where the construction given by the highest Court of the State to the construction of the statute of the state has been uniform and is settled, it is binding upon the Courts of the United States as a rule of decision.

Webster vs. Cooper, 14 Howard 488.

'As a rule,the Supreme Court of the United States treats the construction which the highest Court of the state has given to a statute of that state as a part of the statute."

Douglass vs. Pike County, 101 U. S. 678.

"The construction of a State statute is to be accepted by the Federal Court in determining whether the State statute violates the Federal constitution."

Cargill Co. vs. Minesota, 180 U. S. 452.

'The decisions construing the practice acts

of the State are binding upon the Courts of the United States.'

At. & Pac. R. R. Co. vs. Hopkins, 94 U. S. p. 12;

McGoon vs. Scales, 9 Wall. 23.

If counsel were right in his assertion that the Act of March 3rd, 1893, Section 751, R. S., is the applicable Act, which is strenuously denied, even then he would have no ground for asking a writ of certiorari,because without a special order or decree naming place of sale it is incumbent that property sold under such order or decree be sold at the County Court House, and this mandatory.

Cumberland Lbr. Co. vs. Tunis Lbr. Co. 171 Fed. p. 352.

In passing the act of September 6th, 1916, Chapter 448 (39 Stat. L. 726) which amends Section 237 of the Judicial Code, and which provides for re-examination and review by the Supreme Court of the United States by writ of certiorari in the cases therein specified, it is certain that Congress intended that the sound discretion of the Supreme Court of the United States should be used in directing the issuance of this unusual writ. In fact, this is the construction put on said Act by Justice Vandevanter in the case of

Phila. & Reading Co. vs. Gilbert, 245 U. S. 162.

It would also appear that in passing this amendment to Section 237 of the Judicial Code, Con-

gress evidently had in mind former decisions of the Supreme Court of the United States in which it was held that the writ of certiorari is one sparingly to be used and will only be exercised when the circumstances of the case show the importance of the question involved; to avoid the necessity of conflicting decisions or some matter affecting the interest of the nation.

Forsythe vs. Hammond, 166 U. S. 506.
Smith vs. Vulcan Iron Works, 165 U. S. 518
American Constr. Co. vs. Jacksonville etc., 148 U. S. 372

Where it is so patent,as is the case here,that the statutes of the United States (Act March 3, 1893, R. S. 751) which counsel claims are applicable, can in no aspect of the case have any effect on the decision of this Court, or of the Mississippi Supreme Court, then the writ will certainly be denied.

It is deemed useless to go into the merits of this cause and weary the Court with the numerous equitable defences, such as lasches and the Statute of limitations,, which can not affect a Municipality in the State of Mississippi, since the adoption of Section 104 of the Constitution of 1890 of the State of Mississippi, which provides—"Sec.104—Statute of Limitations in civil causes shall not run against the State or any sub-division, or municipal corporation thereof."

We respectfully submit that the writ of cer-

tiorari herein prayed for should be denied.

GEO. F. MAYNARD

GERALD FITZGERALD

STATE OF MISSISSIPPI.
COUNTY OF COAHOMA.

This day personally appeared before me, the undersigned, a duly qualified and acting Notary Public within and for the County and State aforesaid, Gerald Fitzgerald, who having been by me first duly sworn, states on oath that he is a member of the Bar of the Supreme Court of the United States, and that he has heretofore, on the 20th day of September, 1919, sent by registered mail to Hons. H. D. Minor and Chas. N. Burch, solicitors for the Plaintiffs in Error, at their post-office address, in Memphis, Tennessee, a full, true and correct copy of the foregoing motion to dismiss the petition for Writ of Certiorari herein and the Brief thereon.

GERALD FITZGERALD

Sworn to and subscribed before me this the 20th day of September, A. D. 1919.

E. J. MULLEN,
Notary Public.

Office Supreme Court, U. S.
FILED
OCT 4 1919
JAMES D. MAHER,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., PETITIONERS,

vs.

CITY OF CLARKSDALE, RESPONDENT.

No. [redacted]

REPLY TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE,
Of Counsel.

LATSCH & ARNOLD - MEMPHIS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Petitioners,

vs. No. 402.

CITY OF CLARKSDALE,
Respondent.

REPLY TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

As we read the rules of the Court there is no such practice as a motion to dismiss the petition for certiorari, but the only proceeding open to the respondent is to file a reply brief.

No further answer, therefore, is deemed necessary to this motion except respectfully to call the attention of the Court to the fact that this case is also in this Court on writ of error to the Supreme Court of Mississippi, allowed by the Chief Justice of that Court. With respect, therefore, to the brief filed in support of this motion to dismiss our petition for certiorari we are content to rely on our brief in support of the petition for certiorari already on file and our brief on the writ of error.

Respectfully submitted,
H. D. MINOR,
CHARLES N. BURCH,
Solicitors for Petitioners.

BLEWETT LEE, of Counsel.

Rehearing denied.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* CITY OF CLARKSDALE.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 15. Argued October 6, 1921.—Decided November 7, 1921.

1. A judgment of a state court denying the validity of a title claimed under an execution sale based upon a federal court judgment, because of supposed irregularities in the marshal's attempted exercise of his authority to sell, the authority itself not having been drawn in question, is reviewable by certiorari and not by writ of error, under Jud. Code, § 237, as amended. P. 15.
2. The application of state laws to a marshal's sale of property under a common-law execution issued on praecipe from a federal court,

10. Syllabus.

is governed by the conformity provisions of Rev. Stats., §§ 914, 916. P. 18.

3. The provisions of the Act of March 3, 1893, c. 225, 27 Stat. 751, relative to the place of sale, apply only to judicial sales made under order or decree and requiring confirmation by the court for their validity. P. 18.

4. An assignment of error *held* sufficient to submit to the court below the question whether a marshal's sale was valid under Rev. Stats., § 916. P. 19.

5. Under Rev. Stats., § 916, giving to the party who has recovered judgment in a federal court "similar remedies * * * by execution * * * as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of any such circuit or district court," the state law applicable is that which was in force when the act of which § 916 was a part was originally enacted, viz, June 1, 1872, in the absence of general rules adopting later state law. P. 19.

6. Under § 849 of the Mississippi Code of 1871, which, prior to amendment by § 3467 of the Code of 1892, provided that shares or interests in any corporation, as well as banknotes or evidences of debt circulating as money, might be taken and sold under an execution in the same manner as goods and chattels, or applied to the payment of the execution, and required the custodian of the corporate books to give the levying officer a certificate of the number of shares or amount of interest held by the defendant in the company, and declared that the purchaser of such shares or interest at the execution sale should become the owner thereof in the same manner as if such shares or interest had been regularly assigned to him by the defendant,—a certificate of shares issued to a judgment debtor and found in the custody of his agent or trustee was a proper subject of levy and sale. P. 20.

7. Under the laws of Mississippi, a *venditioni exponas* is not necessary to enable the officer to proceed with the sale of property taken under a *fieri facias* of which the return day has not gone by; and, where the return on the latter writ shows due levy and sale, references therein to a *venditioni exponas* may be treated as surplusage. P. 22.

8. Under Rev. Stats., § 914, which requires that proceedings in common-law cases in the federal courts shall conform to those of state courts "as near as may be," and § 916, which gives the judg-

ment creditor remedies on common-law executions "similar" to those of the state court, an execution sale of personal property which under the state law (Miss. Code, 1871) must be made at the court house of the county may be made at the court house of the United States where the judgment was entered and execution issued. P. 22. *Smith* v. *Cockrill*, 6 Wall. 756, and *Amy* v. *Watertown*, 130 U. S. 301, distinguished.

81 So. 178, reversed.

CERTIORARI to review a judgment of the Supreme Court of Mississippi rendered in favor of the City of Clarksdale in a suit brought by the city to assert its ownership in shares of stock in a railway company. The facts are stated in the opinion.

Mr. H. D. Minor, with whom *Mr. Charles N. Burch* and *Mr. Blewett Lee* were on the briefs, for plaintiffs in error and petitioners.

Mr. Gerald Fitzgerald, with whom *Mr. Geo. F. Maynard* and *Mr. W. W. Venable* were on the briefs, for defendant in error and respondent.

The writ of error should be dismissed. Jud. Code, § 237, as amended. The federal question presented was not of sufficient importance to warrant certiorari.

The Act of 1893, 27 Stat. 751, has no application to a sale of property under execution in common-law cases.

Under §§ 914, 916, Rev. Stats., the only way to enforce one's judgment in the federal court is to proceed according to state practice. *Chamberlain* v. *Mensing*, 47 Fed. 435; *Ex parte Boyd*, 105 U. S. 647; *Perez* v. *Fernandez*, 202 U. S. 80; *Amy* v. *Watertown*, 130 U. S. 301. Section 914 contains the significant words not contained in the former acts,—"any rule of court to the contrary notwithstanding." See *Ward* v. *Chamberlain*, 2 Black, 430. The state rules can be varied only where necessary to enable federal officers to function under them.

The rule of court need not be in writing, but may exist in the general practice of the court. *Wayman* v. *Southard,* 10 Wheat. 1; *Logan* v. *Goodwin,* 104 Fed. 409; *Citizens Bank* v. *Farwell,* 56 Fed. 570.

The form of the marshal's return shows that he was acting under the Mississippi Code of 1892, and is convincing evidence that it was the custom of the court to use the statute in force at the time the officer acted.

The decisions of the state courts construing their own statutes are binding upon the federal court even though it might be said that such state statutes when adopted by the federal courts become *pro hac* federal statutes.

The writs and levy and sale thereunder are all void and of no effect and subject to collateral attack.

At common law, stock in a corporation could not be levied upon, and it is only by statutory authority that this can now be done; the statute must be literally and strictly followed. 17 Cyc. 944, 945; Cook, Corporations, vol. 2, 6th ed., § 480; *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1; Miss. Code, 1892, § 3467.

There is a sharp difference between the real interests of a person in a corporation and the stock certificate or indicium of ownership of the share or interest. Section 3467, Code 1892, especially draws this distinction, and does not provide for the sale of the stock certificate. The distinction is plainly drawn in the *Jellenik Case, supra.* See *Simpson* v. *Jersey City Contracting Co.,* 165 N. Y. 193.

The Code of 1871, § 849, also makes this distinction, for it requires that demand be made upon the company, in which the debtor is supposed to own a share or interest, for the amount and value of said share or interest belonging to the debtor, which provision precludes the idea that the stock certificate itself could be sold as such.

A sale made by the marshal of the United States of personal property or real estate in front of the federal

court building is void. *Koch* v. *Bridges*, 45 Miss. 247; *Jones* v. *Rogers*, 85 Miss. 802; *Moody's Heirs* v. *Moeller*, 72 Tex. 635; *Sinclair* v. *Stanley*, 64 Tex. 72; *Smith* v. *Cockrill*, 6 Wall. 756; *Bornemann* v. *Norris*, 47 Fed. 438.

Where a sale is void and not merely voidable, it may be attacked in collateral proceedings. 17 Cyc. 1286; *Harper* v. *Hill*, 35 Miss. 63; *Koch* v. *Bridges*, *supra*; *Jones* v. *Rogers*, *supra*; *Smith* v. *Cockrill*, *supra*; 2 Freeman on Execution, 3d ed., § 289.

Mr. Chief Justice Taft delivered the opinion of the court.

This is a controversy over the ownership of 250 shares of the stock of the Louisville, New Orleans & Texas Railway Company, a corporation of Mississippi. The City of Clarksdale acquired the stock in 1891, in consideration of $25,000 of bonds issued by it to aid in the construction of a new branch of the Railway Company in which it was interested. The certificate for the stock, the City left in the custody of a Clarksdale bank. The Louisville, New Orleans & Texas Railway Company in 1892 was merged by consolidation in the Yazoo & Mississippi Valley Railroad Company. In 1897, the Pacific Improvement Company, a bondholder, recovered against the City in the United States Circuit Court for the Northern District of Mississippi a judgment for unpaid interest on the bonds amounting to $3,058.13. Execution issued to the marshal who levied on, and took possession of, the stock certificate in the Clarksdale bank and at public sale sold the certificate and shares to the judgment creditor for $100, which was credited on the judgment. In 1898, the City made a compromise with the bondholders, by which, for payment of the principal of the bonds in cash, the bondholders released all claim of interest and transferred the unsatisfied judgment. No mention was made of the

stock in this settlement. In 1904, the Pacific Improvement Company for $2,770.50 sold the stock to the Mississippi Valley Company, an investment company, and transferred the certificate to that company. The value of the stock, which was little or nothing at the time of the judgment and the compromise, has greatly enhanced and is averred to be $75,000.

By its bill in equity in the state chancery court, the City sought to compel the Yazoo & Mississippi Valley Railroad Company to recognize the City's ownership of this stock and to issue to it stock of the consolidated company in lieu thereof, in accordance with the terms of the merger. The Mississippi Valley Company, after the answer to the bill revealed its ownership of the stock, was made a defendant and the real contest became one between the City and that company.

In the pleadings and at the hearing the City attacked the marshal's sale as void under the statutes of Mississippi, and relied on the duty of the United States courts under federal statutes to conform their executions and sales to the laws of the State in which they are held. The state chancery court declared the sale void and granted the relief asked by the City. The state Supreme Court affirmed the decree. No opinion was filed in either court.

We are met by a preliminary question of jurisdiction. The case was first brought here by a writ of error to the state Supreme Court. Then, within due time, a petition for a certiorari was also presented, and consideration of the latter was postponed until the hearing on the writ of error. Under which writ can the case be reviewed here? The Mississippi Valley Company relied below, and here insists, on a title acquired under an execution sale of a United States marshal. This is a title claimed under an authority of the United States. Under § 237 of the

Judicial Code as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, if the validity of an authority exercised under the United States is drawn in question and the decision is against its validity, review is by writ of error. If only a title claimed under an exercise of such an authority is in dispute, then certiorari is the proper writ. The authority of the United States marshal to make sales upon judgments in the United States courts and to give title thereby is not drawn in question in this case. What is denied here is the regularity of the marshal's attempted exercise of his conceded authority and the validity of the resulting title. Hence, the only way of reviewing this cause is by certiorari. *Dana* v. *Dana*, 250 U. S. 220; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Avery* v. *Popper*, 179 U. S. 305, 314. The writ of error is dismissed, the petition for certiorari is granted, and we now proceed to dispose of the case on the latter writ.

The validity of the judgment upon which the execution issued is conceded. The questions to be decided arise on the levy and sale. On the first day of June, 1897, a *fieri facias* issued. This writ the marshal executed and made the following return on it:

"Executed the within writ this the 13th day of Aug. 1897, by levying on and taking into my possession one Certificate of stock, the property of said defendant in the Louisville, New Orleans and Texas R. R. Number 147—for 250 shares, issued to the town or city of Clarksdale, Miss. Further executed on this the 6th day of Dec. 1897, at 12 o'clock meridian by selling said certificate of stock No. 147 after due advertisement by posting notices in three public places for the period of 10 days as provided by law, to the highest and best bidder for cash, before the Western door of the United States Court House, and post office building in the town of Oxford, Miss., at which sale the Pacific Improvement Company

became the highest and best bidder, at and for the price of $100.00 and at the same time and place I executed the writ of vende exponas issued to me in this cause and offered for sale all the interest which the City or Town of Clarksdale had in the Capital Stock of the Louisville, New Orleans & Texas Railway Co. or in the Yazoo & Mississippi Valley Railroad Company, offering said interest at the same time with said certificate of stock to the said Pacific Improvement—for the said sum of $100.00, that being the highest and best bid offered for same.

" Dec. 6th, 1897.

"(Signed) A. J. Cooke,
"U. S. Marshal."

On the back of the certificate the marshal inscribed the following:

" Pacific Improvement Company vs. No. 3900 law. City or town of Clarksdale, Mississippi, in the Circuit Court of the United States for the Western District of the Northern District of Mississippi by virtue of a writ of fieri facias issued in said cause, I levied upon certificate of stock on August 3, 1897, and thereon December 6, 1897, pursuant to said execution and to a certain writ of venditioni exponas, I in the manner provided by law sold this certificate of stock, all the interest of the city or town of Clarksdale in the stock of the Louisville, New Orleans & Texas Railway Company, to the Pacific Improvement Company. Witness my signature this, the 6th day of December, 1897. A. J. Cooke, United States Marshal."

Counsel for the City attack the sale chiefly on two grounds, first that the levy was void because made on a mere muniment or indicium of title to the stock, the certificate, and not on the stock itself; and second that the sale was void because not made at the county court house, as required by the laws of Mississippi.

In applying the laws of Mississippi to the validity of this sale, we are governed by §§ 914 and 916 of the Revised Statutes of the United States, as follows:

"Sec. 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

"Sec. 916. The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of any such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Counsel for the petitioner also relies on the Act of March 3, 1893, c. 225, 27 Stat. 751, which provides in its first section "that all real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct," and in its second section "that all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering

such order or decree, it would be best to sell it in some other manner."

We think that the language of this act limits its application to judicial sales made under order or decree of the court and requiring confirmation by the court for their validity, and that it does not extend to sales under common-law executions which issue by mere praecipe of the judgment creditor on the judgment without order of the court, and in which the levy and sale of the marshal are ministerial, do not need confirmation to give them effect, and only come under judicial supervision on complaint of either party. The sale in such a case depends for its validity on the marshal's compliance with the requirements of law. While the Act of 1893 is not limited to equity and admiralty cases, its passage was doubtless chiefly prompted by the fact that they were excepted from the conformity sections.

It is objected that petitioners can not now rely on § 916 because they did not rely on it in the courts below. Their seventh assignment of error on appeal to the state Supreme Court complained of the refusal of the chancery court "to hold and adjudge that whether the said Act of Congress [*i. e.* the Act of 1893] or the laws of Mississippi governed the sale under said execution, the validity *vel non* of said execution was a Federal question, for that even if the statutes of the State were applicable, the same became Federal statutes by adoption under Act of Congress of June 1, 1872, U. S. Revised Statutes, Section 916". It seems to us that this submitted in the alternative with sufficient specification to the state Supreme Court the question whether § 916 of the Revised Statutes conferred validity on the marshal's sale.

Section 916 gives to the judgment creditor "similar remedies . . . by execution . . . *as are now* provided in like causes by the laws of the State in which

such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court". This section was part of an act "to further the Administration of Justice", enacted by Congress June 1st, 1872, c. 255, 17 Stat. 196. The law of Mississippi applicable to this subject-matter, therefore, is the law which was in force at that date, unless the United States Court for the Northern District of Mississippi has since adopted by general rules later state law. We are not advised that it has done so.

In 1872, the law of Mississippi as to levies on stock of a corporation was § 849 of the Code of 1871, as follows:

"Bank notes, bills, or evidences of debt, circulating as money, or any shares or interest in any incorporated company, belonging to the defendant in execution, may be taken and sold, by virtue of an execution, in the same manner as goods and chattels, or applied to the payment of the execution; and the clerk, cashier, or other officer having the custody of the books of the company, shall, upon exhibiting to him the writ of execution, be bound to give to the officer having such writ, a certificate of the number of shares or amount of the interest held by the defendant in such company, and if he shall neglect or refuse to do so, or if he shall willfully give a false certificate thereof, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect or false certificate, to be recovered in an action on the case against him. The purchaser of such share or interest, at such sale, shall become the owner thereof, in the same manner as if such share or interest had been regularly assigned to him by the defendant."

We are not advised of any construction of this section by the Supreme Court of Mississippi, and we must, therefore, treat it as a case of first impression in determining the proper mode of levying upon shares of corporate stock under its terms.

Taking the section as a whole, it classes bank notes, bills, or evidences of indebtedness circulating as money, and shares in an incorporated company together, and makes them subject to be "taken and sold *as goods and chattels*", or to be "applied to the payment of the execution". At common law, choses in action were not subject to levy as personal property. Here the legislative purpose appears to be to treat the written evidences of the choses in action circulating as money as in themselves capable of manual seizure by the execution officer, and, in appropriate cases, of actual application as money on the execution debt. The joining of shares of stock in this section with such choses in action indicates that the shares are to be regarded as *in pari materia*, and to be dealt with, as nearly as may be, in like manner.

The elaborate and specific provision for a levy upon corporate stock of § 3467 of the Mississippi Code of 1892, which succeeded the Code of 1871, was, and was evidently intended to be, a departure from, and a substantial amendment of § 849 in this respect. Under the later code, provision for levy on bank notes, bills and other evidences of indebtedness is separated from that prescribing the levy on shares of stock. Shares of stock are no longer dealt with expressly as "goods and chattels". The officers of the corporation are no longer required to give a "certificate" of the number of shares held by the judgment debtor to the levying officer, but are to make a statement in writing.

The procedure provided in § 849, in our view, was intended to furnish to the levying officer a certificate of the shares of the defendant which the officer could manually take and offer for sale as the shares, and which when endorsed by the officer with a record of his proceedings and sale would work an assignment of the shares to the purchaser "as if regularly assigned to him by defendant," i. e., by the usual transfer of a certificate. If we are right

in this view, and the absence of any specific form for a levy in the section confirms us in it, then of course, a certificate of shares issued to the debtor and found in the custody of his agent or trustee is the proper subject of levy and sale under the section. This statutory method of treating shares of stock and certificates for them as the same for purposes of levy and "as goods and chattels" is not without parallel. *People* v. *Grifenhagen*, 152 N. Y. S. 679; *Mitchell* v. *Leland Co.*, 246 Fed. 102; *Beal* v. *Carpenter*, 235 Fed. 273; *Puget Sound National Bank* v. *Mather*, 60 Minn. 362.

We think the levy was valid.

Counsel for respondent criticise the recitals of the return as to a *venditioni exponas* and urge that neither ground nor time enough was shown for the issue and return of such a writ. Under the Code of Mississippi, as elsewhere, this is a writ used to compel an officer to proceed to a sale under a *fieri facias*, if any of the property taken remains in the hands of the officer unsold. The writ is not necessary to enable the officer to proceed with the sale unless the return day of the writ has gone by. With this exception, it gives him no authority not previously possessed. Reference to it in the return may well be treated as surplusage, not affecting the validity of the proceedings, if in other respects they are regular.

The chief objection of respondent is to the place of sale, which was at the western door of the United States court house for the Western District of Mississippi in the town of Oxford. Counsel for respondent contend that, under the Mississippi statute, the place of the sale should have been at the court house of Coahoma County at Clarksdale, the county of the judgment debtor, and where the certificate of stock was levied on, and that the sale at the court house of the United States where the judgment was entered and execution issued was void.

The provision in the Mississippi Code of 1871 as to the place of sales on execution was as follows:

"846. All sales by any sheriff or other officer, by virtue of any execution or other process, shall be made at the court house of the county, except when personal property, too cumbersome to be removed, shall be levied on, which may be sold at the place where the same may be found, or at any other convenient place, and also, except where cattle, hogs, sheep, or stock, other than horses and mules, are levied on, the sale of which may be made within the usual hours, on ten days' notice, at the most public place in the neighborhood of the defendant."

The Supreme Court of Mississippi has decided in *Koch* v. *Bridges*, 45 Miss. 247, and *Jones* v. *Rogers*, 85 Miss. 802, that, where land is not sold at the proper county court house, the sale is void. In *Jones* v. *Rogers* the sale was by a United States marshal. It was made at the State House in Jackson. A special Act of Congress of February 16, 1839, c. 27, 5 Stat. 317, provided that the United States marshal for the district of Mississippi should be authorized to sell property at the court house in each county, but that he might, at the written request of the defendant, change the sale to the place where the United States court for the district was held. The court, in the absence of any request of the defendant, held the sale void, saying:

"Statutes fixing the place of sale of lands under executions are mandatory, and not merely directory; and it is the imperative duty of officers to make such sales at the very place designated, and a sale made at any other place is not voidable merely but absolutely null and void. The place of sale is the very essence of the sale, and strict compliance with the statute is absolutely essential in order to transfer a good title to realty."

The court cites other cases of land sales by United States marshals in support of this. *Moody's Heirs* v. *Moeller*, 72 Tex. 635, in which the sale was at the United States court house just across the street from the county court house; *Sinclair* v. *Stanley*, 64 Tex. 72; *Casseday* v. *Norris*, 49 Tex. 613; *Jenners* v. *Doe*, 9 Ind. 461. Mr. Freeman, in his work on Executions, § 289, vol. 2, says of these cases that although a view that such sales were voidable only would be reasonable, the weight of authority sustains them.

With respect to goods and chattels, however, the sale at the place fixed by statute has not been regarded as so essential as compliance with the requirement that the officer selling them shall have the goods in view of the buyers, Freeman on Execution, § 290, vol. 2; and yet, the authorities are divided on the question whether a departure from this requirement renders the sale of personalty void. We do not feel called upon, however, to inquire and decide which is the better view, because we think that under § 916, in respect to sales of personalty, the federal court house was a proper place for holding the sale.

Section 914 requires that the proceedings in common-law cases in the federal court shall conform to those of state courts "as near as may be." Section 916 gives the judgment creditor remedies on common-law executions "similar" to those of the state court. These qualifying words recognize the necessity for some play in adapting the state procedure to the practice of the federal courts. Certain things must be changed. The officer issuing the writ of execution must be the United States clerk, the officer executing it must be the marshal, and not the sheriff, the name of the court must be different, and it is but a reasonable and obvious consequence that the place of the proceedings generally shall be at the federal

court house instead of at the state court house. The inconvenience and danger of injustice to the judgment debtor in having his land sold at the federal court house when it may lie at a great distance from there in a remote county of the State, furnish strong reason why federal and other courts should hold compliance with the injunction of the state laws as to the place of sale of realty indispensable to its validity. But in case of goods and chattels which after seizure and levy can be viewed by bidders as well at a federal court house as at a state court house, there is little ground for holding that such sales, like other proceedings under its authority, may not be properly carried on at the place where the court sits. The distinction between realty and goods and chattels in this matter is recognized in the provisions already noticed, of the Act of Congress of 1893. The first section provides that the real estate must be sold either at the county court house in the county where the land is, or on the premises. No discretion is given the court to change the sale to any other place. The second section, however, while it directs that personalty shall be sold as provided in the realty section, vests full discretion in the court to sell it elsewhere.

The case of *Smith* v. *Cockrill*, 6 Wall. 756, is relied on by counsel for respondent. That was a sale of real estate. The state law required appraisal before sale and a sale at not less than two-thirds the value thus fixed, both of which requirements were wholly disregarded by the marshal. The federal statute applying was the Act of Congress of 1828, c. 68, 4 Stat. 278, which provided that the forms of process, etc., should be *the same* as that used in the state courts. The requirement for appraisal of real estate and its sale at not less than two-thirds of the appraised value by a ministerial officer is much more important in protecting the rights of the judgment debtor

than the place in a sale of personalty. The case of *Bornemann* v. *Norris*, 47 Fed. 438, was also a sale of real estate, and, moreover, was a direct proceeding to quash.

Nor do we think that the quoted language of the court speaking through Mr. Justice Bradley in *Amy* v. *Watertown*, 130 U. S. 301, is in conflict with our view of the effect of these conformity sections. The question in that case was whether when the state statute provided that process could be served on a city, only by leaving the summons with the Mayor, and there was no Mayor, the the federal court could order service to be made on some one else. The court held that, under § 914, the United States courts were limited to the method of service prescribed by the state statute. In adopting a state statute as a guide to the conduct of the business of a United States court and its officers, service on a state municipal corporation specified by a state statute is a very different matter from the fixing of the place for performing the functions of the United States court and its officers. The corporation is completely the creature of a State, and it is usually within the function of the creator to say how the creature shall be brought before judicial tribunals. It was with reference to such a matter that Mr. Justice Bradley said that the statute of 1872 was peremptory, and federal courts must conform to the practice of state courts.

For the reasons given, we hold that the sale of the 250 shares of stock to the Pacific Improvement Company vested a good title.

The decree of the Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.